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Supreme Court, U.S.
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No. 91-

In The
# Supreme Court of the United States
October Term, 1991

TONY AVIRGAN, and MARTHA HONEY,

*Petitioners*,

v.

JOHN HULL, *et al.*,

*Respondents*.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a federal court impose a sanction of more than $1 million against non-lawyer clients because they were "willful participants" in a lawsuit that their attorneys were found to have litigated in bad faith and because they "must have known prior to suing that there was no competent evidence to substantiate" their claims, even though there was no evidence that the clients had such knowledge or that they were capable of making judgments about the admissibility of evidence?

## PARTIES TO THE PROCEEDING

Petitioners Tony Avirgan and Martha Honey were plaintiffs in the district court and appellants in the court of appeals. They were represented in the district court by respondent Daniel P. Sheehan, who is filing a separate petition, and his employer, the respondent Christic Institute, a public interest law firm which is also filing a separate petition. Both Sheehan and the Christic Institute were non-party appellants in the court of appeals. The remaining respondents John Hull, Bruce Jones, Rene Corbo, Felipe Vidal, Moises Dagoberto Nunez, Francisco Chanes, Ramon Cecilio Palacio, Ricardo Gris, William Gris, Roger Lee Pallais, Amac Galil, Hector Cornillot, Jorge Gonzalez, Adolfo Calero, Alvaro Cruz, Frederico Saenz, Robert Owen, John Singlaub, Ronald Joseph Martin, Sr., James McCoy, Tom Posey, Rafael "Chi" Quintero, Mario Delamico, Tom Clines, Ted Shackley, Albert Hakim, Richard Secord, Pablo Escobar, and Jorge Ochoa were all defendants in the district court. Some were never served or for other reasons were not appellees in the court of appeals.

In addition to the parties, the following individuals and entities filed briefs *amicus curiae* supporting the appellants in the court of appeals: Church of the Brethren, Church Women United, Conference of Major Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious, the Maryknoll Fathers and Brothers, General Conference Mennonite Church, National Council of Churches of Christ in the U.S.A. Unitarian Universalist Association, the Womens Division of the United Methodist Board of Global Ministries, Professor Melissa Nelken, Professor Carl Tobias, and Professor Mary Twitchell, Trial Lawyers for Public Justice, Public Citizen, and Alliance for Justice. Counsel for petitioners Avirgan and Honey were not counsel for petitioners below, but were counsel on the *amicus* brief submitted by Public Citizen and the Alliance for Justice.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

A. Background ..... 2

B. Proceedings in the District Court ..... 3

C. The Opinion of the Court of Appeals ..... 7

REASONS FOR GRANTING THE WRIT ..... 8

The Decisions Below Are Contrary To The Rulings Of This Court And Depart So Far From The Accepted And Usual Course Of Judicial Proceedings As To Raise Fundamental Questions About Denial of Access To The Courts. ..... 8

CONCLUSION ..... 15

APPENDIX

Opinion of the Court of Appeals ..... 1a

District Court Order Granting Sanctions ..... 24a

Clarification Order of the District Court ..... 42a

Order of the Court of Appeals Denying Rehearing ..... 46a

## TABLE OF AUTHORITIES

**Cases:**

*Alyeska Pipeline Service Co.*,
421 U.S. 240 (1975) ..... 5

*Avirgan v. Hull*,
691 F. Supp. 1357 (S.D. Fla. 1988) ..... 4

*Chambers v. NASCO, Inc.*,
111 S. Ct. 2123 (1991) ..... 11, 12, 13

*Collins v. Walden*,
834 F.2d 961 (1987) ..... 5, 8, 9

*NASCO, Inc., v. Chambers*,
124 F.R.D. 120 (W.D. La. 1989) ..... 11, 12, 13

*Roadway Express, Inc. v. Piper*,
447 U.S. 752 (1980) ..... 14

**Statutes and Regulations:**

18 U.S.C. § 1964 ..... 4

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 1331 ..... 4

28 U.S.C. § 1927 ..... 2, 5, 6, 8

Fed. R. Civ. P. 11 ..... 2, 5, 6, 7

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Tony Avirgan and Martha Honey hereby petition this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming a sanctions award against them of more than $1 million.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit appears in petitioners' appendix ("Pet. App.") at 1a-23a and is reported at 932 F.2d 1572. The order denying rehearing and rehearing *en banc* is not reported and appears in Pet. App. 46a-47a. The February 2, 1989 Order of the United States District Court for the Southern District of Florida awarding sanctions and attorneys' fees, together with its Order of February 24, 1989, clarifying that Order, are reported at 705 F. Supp. 1544 and 125 F.R.D. 189, and appear in Pet. App. 24a-41a and 42a-45a, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. On August 7, 1991, Justice Kennedy signed an order extending the time to file a petition for a writ of certiorari to and including October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

There are no statutes, rules, or constitutional provisions directly at issue in this petition because the district court specifically found that Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 were inapplicable to these petitioners, although they were applied to their attorneys. The validity of the sanctions award against these petitioners turns on the judicially created "bad-faith" exception to the American Rule, which generally prohibits shifting of attorneys' fees to the losing party.

## STATEMENT OF THE CASE

### A. *Background*

Most of the facts in this case relevant to the responsibility of the respondents for the actions alleged in the complaint were in sharp dispute. However, there are a core of facts relevant to the sanctions award on which there is agreement and on which the propriety of the sanction of in excess of $1 million against the petitioners Tony Avirgan and his wife Martha Honey turns. That sanction was imposed jointly and severally against them and Daniel Sheehan, the lead counsel on the merits of this case ("Sheehan") and his public interest law firm and employer, the Christic Institute ("Christic"), who are filing separate petitions in this Court. As used herein, the term plaintiffs shall mean only petitioners Avirgan and Honey; the term petitioners shall include plaintiffs, Sheehan, and Christic. The term respondents shall mean the defendants in the trial court who were appellees in the court of appeals.

On May 30, 1984, plaintiff Avirgan, a professional journalist,

was attending a press conference as a representative of ABC News held by Eden Pastora just across the Costa Rican border in La Penca, Nicaragua. In an apparent attempt to kill Pastora and the journalists present, a bomb was detonated at the conference, severely injuring a number of supporters of Pastora and journalists, including plaintiff Avirgan, who also had all of his equipment destroyed. As a result of his injuries, Avirgan was hospitalized in Costa Rica and Philadelphia, sustained major medical costs, and lost considerable time from his work. His wife, plaintiff Honey, who was not with him at the time, was also required to devote considerable time away from her job as a journalist to take care of him.

Both because of his journalistic interest in the activities in Central America and the injuries he sustained in the bombing at La Penca, plaintiff Avirgan, joined by his wife, embarked on a major investigation into the incident at the request of several independent press organizations. They eventually published a report entitled "La Penca: Report of an Investigation," which connected a number of the respondents with the events leading to the La Penca bombing. Following publication of that report, the respondent John Hull sued plaintiffs for criminal libel in Costa Rica, and at a trial held in early May 1986 they were acquitted of the charge, and that ruling was affirmed on appeal.

Meanwhile, an investigation into these and other related events was being undertaken by Christic and Sheehan. Eventually, plaintiffs Avirgan and Honey met with Sheehan, and they agreed to file a lawsuit in which Christic and Sheehan would represent plaintiffs on a pro bono basis in an effort to recover their damages and to enjoin the conspiracy which they believed had caused these and other injuries. It was agreed that the allegations of the lawsuit would be based on both the investigations undertaken by plaintiffs and those undertaken by Sheehan and Christic. Since plaintiffs are not attorneys, the details of the complaint and the litigation were left to Sheehan and Christic.

B. *Proceedings in the District Court*

The complaint was filed on May 29, 1986, in the United

States District Court for the Southern District of Florida with jurisdiction based on 18 U.S.C. § 1964, commonly known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and 28 U.S.C. § 1331. Named as defendants were John Hull and a number of others who were identified in plaintiffs' La Penca report, as well as others whose participation in the conspiracy alleged in the complaint was determined through the separate investigation undertaken by Christic. The plaintiffs, who resided in Costa Rica at all relevant times, did not sign either the original or any of the amended complaints, nor did they execute any affidavits. They did sign affirmations as to the answers to several sets of interrogatories, and they were eventually deposed at great length, with their testimony covering more than 800 pages between them.

Instead of answering the complaint, defendants filed a motion to dismiss, which included a claim that the RICO complaint could not be filed without a showing of probable cause. Although denying the need to establish probable cause, Sheehan filed an affidavit detailing at great length the investigations undertaken in order to support the complaint. The court denied the motion to dismiss. Because it concluded that there was no probable cause requirement, there was no necessity for passing on the sufficiency of the Sheehan affidavit. Discovery then proceeded with little or no involvement of the plaintiffs, other than that noted above.

Eventually, respondents moved for summary judgment, and the district court granted the motion on the purely legal ground that there was no "admissible" evidence that showed a causal connection between the conspiracy alleged in the complaint and the injuries to the plaintiffs because all of plaintiffs' evidence on this issue was "inadmissable hearsay." *Avirgan v. Hull*, 691 F.Supp. 1357, 1375-76 (S.D. Fla. 1988). Sheehan and Christic then filed a notice of appeal on behalf of the plaintiffs and represented them on the appeal, in which they contended that the motion for summary judgment had been improperly granted.

Meanwhile, most of the respondents moved in the district court for sanctions, in the form of attorneys' fees and costs, against

plaintiffs, Sheehan, and Christic, jointly and severally. The motions relied on Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the "bad-faith" exception to the American Rule. Despite the different legal theories on which each might be held liable, Sheehan and Christic filed a single opposition on behalf of themselves and the plaintiffs. On February 2, 1989, the district court granted the motions with respect to virtually all of the attorneys' fees and costs sought. The award exceeded $1 million and was imposed jointly and severally against the plaintiffs, Sheehan, and Christic.

To support this ruling, the district court's brief discussion asserted that, after "two years of protracted and extensive discovery," plaintiffs were "unable to produce a single witness who could state the defendants exploded the bomb or were responsible for the assassination attempt" and, therefore, that the attorneys for the plaintiffs "must have known prior to suing that they had no competent evidence to support" the claim. Pet. App. 24a. The court then referred to the Sheehan affidavit which it characterized as the basis on which "plaintiffs were permitted to conduct two years of discovery." *Id.* at 25a. It then stated that many of the allegations "were based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." *Id.* at 26a. Accordingly, it concluded, quoting from the Eleventh Circuit opinion in *Collins v. Walden*, 834 F.2d 961, 964 (1987), that "plaintiffs 'had every reason to know they stood no chance of proving' that the defendants were responsible for the injuries to Tony Avirgan." *Id.* Equating this inability to prove their case with an "abuse of the judicial process," the court held that "the plaintiffs" were required to "make the defendants whole by paying the fees the defendants have been forced to expend for attorneys in this action." *Id.* Finally, in the course of its much lengthier discussion of the amount of fees and costs, the court noted that the award was made "coextensively pursuant to the 'bad faith' exception to the American Rule, *see Alyeska Pipeline Service Co.*, 421 U.S. 240 (1970), 28 U.S.C. § 1927 (1986), and Fed. R. Civ. P. 11." Pet. App. 35a n.5.

Although respondents had prevailed on the motion, they nonetheless asked the court to explain who was responsible for

what costs and fees. Thereafter, on February 24, 1989, the court issued a three-and-a-half page "Order Clarifying Order Dated February 2, 1989," which stated that "liability for the costs and fees must rest jointly and severally with Daniel Sheehan, Esq., The Christic Institute, and the plaintiffs Tony Avirgan and Martha Honey." Pet. App. 43a. The court then attempted to explain the use of its term "coextensively," suggesting that it "indicates that each of the authorities, separate unto itself, support the entire award. Of course different legal standards govern the award under each authority." *Id.* The court found that Sheehan was liable as lead counsel and because he formulated "the litigation strategy and tactics that justified the entire award under the bad faith exception and 28 U.S.C. § 1927." *Id.* The court further observed that he "also signed the complaint and affidavit upon which the court justified the entire award under Fed. R. Civ. P. 11." *Id.* The court also based the sanction on Sheehan's neglect of "his continuing obligation under all three authorities to assure that the allegations in the complaint and the affidavit were borne out in the discovery process." *Id.*

The district court next found Christic liable as the "self-pronounced law firm representing the plaintiffs" whose "attorneys carried out Mr. Sheehan's litigation strategy, and willingly participated in the litigation tactics." Pet. App. 44a. It noted that Christic's name appeared on "all or most of the plaintiffs' filings" and that "it acted through its officers, the attorneys representing the plaintiffs," which made it liable because of "its agents' neglect of their continuing duty under all three authorities to avoid this frivolous lawsuit." *Id.*

Finally, it turned to the award against the plaintiffs, which it sustained "[f]or like reasons." *Id.* First, it asserted that the plaintiffs cannot be liable under Rule 11 or section 1927 because they are not attorneys, but found them liable because they were "willful participants in Mr. Sheehan's litigation strategy." *Id.* It further noted that the Institute paid them "approximately $50,000 for consultation, public speaking, and trips from Costa Rica to the United States," *id.*, although failing to note that much of that money was reimbursement for out-of-pocket expenses, principally for travel, or that the compensation was principally for

investigative work which was admittedly done. The court did not explain either its theory of "willful participation" or the relevance of the reimbursements and other payments, nor make any other findings or cite any other evidence; it simply concluded that the plaintiffs were liable for the entire award under the bad-faith exception. *Id.*

C. *The Opinion of the Court of Appeals*

Appeals from the sanctions orders were consolidated with those on the merits in the Eleventh Circuit.[1] That court first rejected the claims that summary judgment was improperly awarded and then turned to the sanctions issues. Initially, it quoted three paragraphs from the first sanctions order, with no mention made of the staggering amount involved. Pet. App. 18a-19a. The court asserted that plaintiffs did not dispute the quoted paragraphs, although it did not explain why that was relevant since all three related to the conduct of Sheehan and Christic. *Id.* The court began its discussion of the sanctions award by stating that "Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit that the complaint was well-grounded in fact," citing to Rule 11 in a footnote. Pet. App. 20a-21a and n.11. The court then focused on the Sheehan affidavit, from which it concluded that it is "obvious that if the appellants [not distinguishing between plaintiffs and their attorneys] knew (*must have known*) prior to filing this lawsuit that they had no *competent* evidence, then this complaint was not well-grounded." *Id.* (emphasis added). To buttress its finding of liability, the court pointed to the fact that "discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing." *Id.*

Turning to the clarification order, the court of appeals noted

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[1] Sheehan continued as lead counsel on the merits. On the sanctions issue, outside counsel Eugene Scheiman, was brought in to represent plaintiffs and Christic, although Christic attorneys (other than Sheehan) were also on the briefs. Sheehan was represented on the sanctions issue by other outside counsel, Morton Stavis. Mr. Scheiman made the principal argument on the consolidated appeals, although Mr. Sheehan spoke briefly at the end.

that the plaintiffs were found liable "as willful participants in Sheehan's litigation strategy" under the bad-faith exception, this time with a footnote citation to 28 U.S.C. § 1927, which applies only to attorneys. *Id.* at 22a. The court also observed that courts "may assess attorneys' fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith" and then concluded that it had "no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings," without attempting to identify the precise manner in which plaintiffs, as opposed to their attorneys, had done so. *Id.* The court then quoted the portion of *Collins v. Walden*, *supra*, which states that, when "it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest" *id.*, without explaining how even an unjustified failure to abandon a case at some point could possibly sustain an award of $1 million in attorneys' fees accumulated from the beginning of the case to the end.

## REASONS FOR GRANTING THE WRIT

### The Decisions Below Are Contrary To The Rulings Of This Court And Depart So Far From The Accepted And Usual Course Of Judicial Proceedings As To Raise Fundamental Questions About Denial of Access To The Courts.

Although the petition presents two reasons why review should be granted, they can be summarized in a single proposition: if the decision below is allowed to stand, it will work a dramatic upheaval in the traditional relationship between lawyer and client. Until now, clients were entitled to rely on their lawyers' judgments about the technical aspects of litigation. If their lawyers engaged in misconduct, it was the lawyer, not the client, who paid the price. That is no longer so in the Eleventh Circuit. Massive sanctions have been imposed against plaintiffs solely because they failed to second-guess their lawyers on the highly technical question of whether the evidence that had been gathered before and after the complaint was filed was admissible in a court of law. Thus, under the ruling below, clients become, in essence, the guarantors of the professional judgments of their

attorneys and become liable for a bad faith sanction if they fail to supervise their lawyers adequately. We submit that courts should not, and may not under the American Rule, impose that heavy burden on lay clients.

1. Although couched in other language, the sanctions rulings challenged by plaintiffs are based on the following propositions, viewed in the light most favorable to respondents. After extensive discovery in a civil case for damages, involving a conspiracy to commit murder and other crimes, largely outside of the United States, the petitioners were unable to produce any witnesses or other admissible evidence to establish the causal connection between the bombing, which physically injured the plaintiff Avirgan, and the activities of respondents. Based on this inability, petitioners "must have known" when they filed their complaint two years earlier that they could not produce competent, admissible evidence of their allegations since even their sources had no first-hand knowledge of the facts alleged.

It is this conduct -- and only this conduct -- that led the district court in its initial decision to conclude that plaintiffs had "every reason to know they stood no chance of proving that the defendants were responsible for the injuries to Tony Avirgan," Pet. App. 26a, and that their decision to proceed constituted an abuse of the judicial process for which plaintiffs, not simply their attorneys, were required "to make the defendants whole" by paying all of their attorneys' fees and costs in the action from the time the case was filed. *Id.* Subsequently, in its clarification order, the district court limited the liability of the plaintiffs to the bad-faith exception to the American Rule, which it found to have been violated because they were "willful participants in Mr. Sheehan's litigation strategy," Pet. App. 44a, and perhaps because they were reimbursed for travel and other expenses directly related to the litigation and received compensation for investigative services, although the court never explained the connection between those payments and the bad-faith litigation claim. The court of appeals followed essentially the same approach in upholding the award against plaintiffs, solely on the bad-faith standard.

To begin with, the bad-faith allegations against Sheehan, and

derivatively against Christic, are extremely tenuous. The district court did not find that they actually knew that they could not prove the allegations in the complaint when it was filed or at any time thereafter. Nor did the court find that Sheehan had not undertaken a reasonable investigation before filing. Rather, with the benefit of hindsight, after discovery proved unavailing, the district court concluded that Sheehan "must have known" that he could not prove his case. Even worse, it did not say that the case was groundless, but only that petitioners could not produce "competent" evidence. Focusing on the duty to stop at the point when evidence was not forthcoming, the court said that Sheehan disregarded that duty and then imposed fees against him from the start of the case, not from the point at which he should have known that he could not produce admissible evidence.

Even assuming that such conduct allows for a finding of bad-faith against Sheehan and Christic -- which we believe it does not -- assessing sanctions against their clients, the plaintiffs Avirgan and Honey, requires an unprecedented extension of the bad-faith doctrine. Nothing that the district court relied on was their responsibility, and the only activity that they performed -- preparing the report on the bombing at La Penca -- was never mentioned by the district court in its sanctions opinions, and the court of appeals mentioned it only in the summary judgment section, and then only to note that it was not admissible. Pet. App. 12a. In effect, the courts held that the plaintiffs were vicariously liable because their attorneys had not turned up sufficient admissible evidence to withstand summary judgment. And they applied that ruling not just from the time when it became known that discovery was unsuccessful, but from the start of the case, which resulted in an award of more than $1 million in attorneys' fees and costs.

Moreover, the district court did not find that the allegations in the complaint were groundless, but that there was no competent or admissible evidence to support them. Thus, two individuals, who are not trained in the law, were held liable for not knowing that their report and the other evidence that their attorneys had gathered would not be admissible in a court of law. They were, in essence, penalized $1 million for not knowing that acceptable journalistic standards of proof would not be sufficient in court.

This result, and the inevitable chilling effect that it will have on clients who are considering bringing controversial cases, especially those that are difficult to prove without formal discovery, is a sufficient basis for this Court to grant review.

2. There is yet another reason for the Court to review the $1 million sanction and the grounds on which it was based: it is fundamentally inconsistent with this Court's recent application of the bad-faith exception in *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991). The entire thrust of that decision, which was handed down 12 days before the ruling of the court of appeals and was noted in plaintiffs' suggestion for rehearing *en banc*, is that the bad-faith exception is to be cautiously used, under limited circumstances, and applied only to the most recalcitrant of parties who are personally responsible for conduct found to be an abuse of the judicial process. A brief review of the facts of *Chambers* and its admonitions demonstrates how far the decision below deviates from it in sustaining an award of attorneys' fees under the bad-faith exception.

Mr. Chambers was the defendant in a suit for specific performance of a contract to sell a television station. After vigorously litigating until the eve of trial, Chambers abandoned all of his defenses save one, a legal technicality that was swiftly rejected by the district court and found by the court of appeals to be frivolous. The district judge who had presided over the case and was thoroughly familiar with it then held a sanctions hearing and wrote an opinion running 24 pages in the Federal Reporter, in which he concluded that Chambers was "the strategist" behind a scheme devised "first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance." 124 F.R.D. 120, 132, 136 (W.D. La. 1989), *quoted at* 111 S. Ct. 2130-31. The district court specifically found that Chambers had engaged in an attempted fraud on the court, filed false and frivolous papers, and engaged in "other tactics of delay, oppression, harassment, and massive expense to reduce plaintiff to exhausted compliance." 124 F.R.D. at 138, *quoted at* 111 S. Ct. at 2131. As this Court described the basis of the sanction, it was that Chambers' "entire course of conduct throughout the lawsuit

evidenced bad faith and an attempt to perpetuate a fraud on the court. . . ." *Id.* at 2136, and that he was sanctioned "for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation." *Id.* at 2138. This Court further noted the numerous warnings given to Chambers and cited the "frequency and severity of Chambers' abuses of the judicial system" as bases for imposing the sanction. *Id.* at 2139.

Most relevant to this petition, Chambers had claimed that the district court failed to allocate responsibility between him and his attorney. This Court rejected that assertion as "flatly contradicted by the district court's detailed factual findings concerning Chambers' involvement in the sequence of events at issue," noting that the district court had found that the abuse was caused "solely by the relentless, repeated fraudulent and brazenly unethical efforts of Chambers" and others, *quoting* 124 F.R.D. at 136. *Id.* at 2139-40. *See also id.* at 2130, rejecting advice of counsel claim based on similar findings of the district court. Thus, *Chambers* was based on detailed, specific findings of personal wrongdoing on the part of the client, not his attorney, wrongdoing that was intentional, frequent, and severely disruptive of the court and the other party throughout the entire case. *Id.* at 2138. The contrast between the cases could hardly be greater.

Beyond the enormous gulf between the facts found to justify the sanctions in *Chambers* and those found sufficient here by the lower courts, this Court went to great lengths in *Chambers* to explain the very limited circumstances in which the inherent power of the federal courts to award attorneys' fees under the bad-faith exception against lay clients should be exercised. Among the Court's admonitions were the following, all of which the lower courts here violated and, in the case of the court of appeals, disregarded:

- "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Id.* at 2132.

- Attorneys' fees should be imposed under the bad faith

rationale only in "narrowly defined circumstances." *Id.* at 2133.

* The inherent power to award attorneys' fees under the bad-faith exception is limited "to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders." *Id.* at 2134.

* Rule 11 was amended in 1983 "precisely because the subjective bad-faith standard was difficult to establish." *Id.* at 2134 n.11.

* "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the required bad faith exists and in assessing fees. . . ." *Id.* at 2136.

* The "bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Id.* at 2137.

* Under the bad faith exception, "the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed." *Id.*

* The bad-faith standard is, "of course, punitive" and should be used only where there is a "recalcitrant litigant." *Id.* (quotations omitted).

Indeed, this case is precisely the kind Justice Kennedy envisioned in his dissent in *Chambers*, where he expressed grave concern that the bad faith doctrine and the limited review available for abuse of discretion would mean that the district court would not have to meet any test "other than the talismanic recitation of the phrase 'bad faith' [which] will foreclose meaningful review of sanctions based on inherent authority." *Id.* at 2145.

*Chambers* is not the only contrary decision of this Court on bad-faith; it is simply the most recent and complete discussion.

Thus, this Court's earlier ruling in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), contains similar warnings that went unheeded below. There, sanctions were sought against attorneys who were found guilty of deliberate inaction and refusal to comply with the court's orders regarding the conduct of the litigation. This Court observed that the bad-faith exception was not limited to those who file in bad-faith, but also applied to those who conducted the litigation in bad-faith. *Id.* at 766. However, the Court cautioned that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion," they should be applied only in "narrowly defined circumstances," and fees should "not be assessed lightly." *Id.* at 764, 765, 767. Although the court of appeals cited *Roadway Express*, Pet. App. 22a, 23a, it plainly did not understand its import.

Of course, the harm from the rulings below extends far beyond the plaintiffs in this case. They have, in essence, been held liable for believing they had a viable case against respondents, a belief that was reenforced by the fact that they had successfully defended a libel action brought against them by the principal respondent, John Hull, based on their report, which formed a significant portion of the basis for the complaint in this case. If that highly unusual pre-filing vindication is not enough, no well advised individual will ever file suit in circumstances remotely resembling these, given the risk of financial ruin from having to pay the attorneys' fees of their opponents.

There is another factor that will surely magnify the difficulty of finding individuals willing to serve as plaintiffs in cases such as this. Although the plaintiffs here sued to recover actual and punitive damages, that plainly was not their sole motivating factor in bringing suit. Indeed, in many civil rights and constitutional law cases there is even less likelihood of financial recovery for the individual plaintiffs, or even a class of plaintiffs, a fact that often discourages individuals from being plaintiffs at all. But when that small possibility of monetary or even psychological gain has to be weighed against the enormous financial risk of sanctions if the suit is not successful, few individuals will be willing to accept those odds.

Moreover, the courts below made no effort to inquire into the relative responsibilities of the plaintiffs and their counsel: they simply held plaintiffs liable under a standard that they "must have known" that the information they had was not admissible evidence. But it is difficult to see how it is proper to sanction lay persons if they have relied on counsel for the sufficiency and admissibility of evidence in order to meet the requirements for suing in federal court. Accordingly, the result below, unless reviewed and reversed by this Court, will send the clearest message to all potential plaintiffs in public interest cases: don't do it.

## CONCLUSION

For the foregoing reasons, the petition of Tony Avirgan and Martha Honey should be granted.

Respectfully submitted,

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October 15, 1991

## *APPENDIX*

[Filed June 18, 1991]

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Tony AVIRGAN and Martha Honey,
*Plaintiffs-Appellants,*

v.

John HULL, Adolfo Calero, Robert Owen, John K. Singlaub, Ronald Joseph Martin, Sr., James McCoy, Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim, and Richard Secord,
*Defendants-Appellees,*

Bruce Jones, et al.,
*Defendants.*

Tony AVIRGAN and Martha Honey,
*Plaintiffs-Appellants,*

v.

John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, Thomas Posey, John K. Singlaub, Ronald Joseph Martin, James McCoy, Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim and Richard Secord,
*Defendants-Appellees,*

Rene Corbo, et al.,
*Defendants.*

Tony AVIRGAN and Martha Honey,
*Plaintiffs-Appellants,*

Daniel P. SHEEHAN and The Christic Institute,
*Non-Party-Appellants,*

v.

John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert Owen, John Singlaub, James McCoy, Ronald Joseph Martin, Sr., Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Richard Secord, and Albert Hakim,
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*Defendants-Appellees,*

Rene Corbo, et al.,
*Defendants.*

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Nos. 88-5720, 89-5143, 89-5232
and 89-5515.

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Appeals from the United States District Court for the Southern District of Florida.
(D.C. No. JLK-CIV-86-1146)

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Michael W. Burnbaum, Coral Gables, Florida; Raul de Cubas of Diaz Silviera and Associates, Coral Gables, Florida; Robert F. Garcia-Esquerro, Miami, Florida; Thomas C. Green and Paul Castellitto of Green & Lankford, Washington, D.C.; Leonard Greenbaum and Thomas Hylden of Sachs, Greenbaum & Taylor, Washington, D.C.; Theodore Klein of Fine, Jacobson, Schwartz, Nash, Block & England, Miami, Florida; Luis S. Konski of Walton, Lantaff, Schroeder & Carson, Miami, Florida; Jack McKay and Jane Sullivan of Shaw, Pittman, Potts & Trowbridge, Washington, D.C.; Joseph Portuondo of Fitzgerald, Portela & Portuondo, Miami, Florida; Edwin R. Smith, Evansville, Indiana; Thomas R. Spencer of Spencer, Bernstein, Seeman & Klein, Miami, Florida; for Defendants-Appellants.

Eugene R. Scheiman, New York, New York; Daniel P. Sheehan of the Christic Institute, Washington, D.C. (Phil Hirschkop, Alexandria, Virginia; Joanne Royce and Lanny Sinkin of the Christic Institute, Washington, D.C., with them on the briefs) for Plaintiff-Appellees.

Eugene R. Scheiman, New York, New York; (Joanne Royce and Lanny Sinkin of the Christic Institute, Washington, D.C., with him on the briefs) for Appellee the Christic Institute.

Morton Stavis of Center for Constitutional Rights, New York, New York (Joan Gibbs, Katherine Gorove, and Stephanie Y. Moore of Center for Constitutional Rights, New York, New York with him on the briefs) for Appellee Daniel

P. Sheehan.

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Before HATCHETT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

HATCHETT, Circuit Judge:

Two journalists, their lawyers, persons and entities associated with the journalists and lawyers, in this consolidated appeal involving the Nicaraguan Contra affair, seek reversal of the district court's orders granting summary judgment against them and imposing sanctions in excess of one million dollars. We affirm the district court.

## FACTS

On May 30, 1984, Tony Avirgan and his wife, Martha Honey, appellants, who are American journalists based in Costa Rica and cover Central America for various news agencies, attended a press conference of Contra leader Commandant Eden Pastora at the campground of the Southern Contra Force in La Penca, Nicaragua. About thirty journalists traveled to the guerilla campground. At the press conference, a bomb exploded killing eight people and wounding numerous others. Avirgan and Honey allegedly suffered personal injuries, damages to television camera equipment, loss of business due to the bombing, and loss of consortium. Avirgan and Honey claim that the bombing was the product of a criminal racketeer influenced and corrupt organization (RICO) enterprise consisting of the appellees

with the goal of overthrowing the government of Nicaragua.[1] The appellees include alleged Central Intelligence Agency operatives, military intelligence personnel, arm merchants, mercenaries, and Colombian drug lords. Most of the allegations are based geographically in Nicaragua, but some allegations accuse various appellees of anti-communist operations in Cuba, Southeast Asia, Iran, Libya.

Chief Judge James Lawrence King, in his thorough opinion, summarized Avirgan and Honey's theory of their case as follows:

> It is the theory of plaintiffs' case that the defendants established an enterprise, the purpose of which was to violate the principles espoused in the Neutrality Act and that all of the alleged patterns of racketeering activity were performed to promote the goal of this enterprise. Central to the alleged violations of each subsection of § 1962 is the plaintiffs' purported Neutrality Act enterprise. The plaintiffs allege that in May, 1983 the defendants

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[1] The status of persons involved in these cases is as shown below:
Appellants: Tony Avirgan (Plaintiff), Martha Honey (Plaintiff), The Christic Institute, and Daniel P. Sheehan.
Appellees: John Hull, Moises Dagoberto Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, John K. Singlaub, Ronald Joseph Martin, Sr., James McCoy, Thomas Posey, Rafael Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim, and Richard Secord.
Defendants only: Bruce Jones, Rene Corbo, Francisco Chanes, Ricardo Gris, William Gris, Robert P. Pallais, Hector Cornillot, and Frederico Saenz.
Named as defendants but not served: Felipe Vidal Santiago, Ramon Cecilio Palacio, Amac Galil, Alvaro Cruz, Pablo Escobar, and Jorge Ochoa.

Francisco Chanes, Moises Nunez, Hector Cornillot, Rene Corbo and Felipe Vidal Santiago established an enterprise. The purpose of the enterprise was to launch a Cuban/American mercenary expeditionary force against the Republic of Nicaragua, from Costa Rica, along the 'Southern Front.'

The plaintiffs also contend that these defendants established a cocaine smuggling operation through Costa Rica to finance the workings of this enterprise in violation of the Neutrality Act. 18 U.S.C. § 960 (1986). It is asserted that the original purpose of these individuals was to assist an indigenous Nicaraguan group, the Revolutionary Democratic Alliance ('ARDE').

The ARDE was engaged in guerilla attacks against Nicaragua under the leadership of Eden Pastora. The plaintiffs maintain that sometime after this original joinder of forces the enterprise decided to remove Pastora as leader of ARDE in order to merge ARDE into alliance with the Honduras based contra group, the Nicaraguan Democratic Force ('FDN') and facilitate its narcotics trafficking in Costa Rica.

*Avirgan v. Hull*, 691 F.Supp. 1357, 1363-64 (S.D.Fla.1988).

## PROCEDURAL HISTORY

On May 29, 1986, Avirgan and Honey filed a complaint in the United States District Court for the Southern District of Florida. Avirgan and Honey's racketeering allegations include the following: the attempted murder of Eden Pastora; the murder of eight persons at the press conference in La Penca; the attempted murder of Avirgan at the La Penca bombing; the trafficking of arms and explosives in violation of state and federal law; the transferring of funds from illegal weapons and explosives dealings; the conspiracies to murder Pastora on two occasions; the conspiracy to kidnap

informants - Carlos Rojas Chinchilla and a person identified only as "David"; the murder of David; the conspiracy to transport cocaine into the United States; and the conspiracy to murder the United States Ambassador to Costa Rica. The primary allegation, however, is that Amac Galil, disguised as a journalist named Per Anker Hansen, detonated the bomb at the La Penca press conference, and acted in concert with the twenty-eight other persons named in the amended complaint.

Avirgan and Honey also allege state law claims which include: battery, loss of consortium, assault, intentional infliction of mental distress, trespass, damage to personal property, and a state RICO claim under Fla.Stat.Ann. § 895.03.

In their amended complaint, Avirgan and Honey specified the relevant time period as May, 1983, through May 29, 1986. Thus, for discovery purposes, the court granted the time limit specified plus six months before the first alleged overt act, which occurred in May, 1983. The district court limited discovery to a four-year period covering the relevant alleged conspiratorial time period of December, 1982, until November, 1986. The district court also limited the subject matter discovery to the purchase or sale of military equipment; weapons; or explosives; transactions in illegal drugs; the operation of the alleged Neutrality Act enterprise; and any action resulting in or causing injury to Avirgan and Honey.

After two years of discovery, several appellees moved for summary judgment alleging that Avirgan and Honey had failed to state a claim under RICO. In addressing this motion, the district court thoroughly analyzed the evidence Avirgan and Honey presented, in order to determine whether they had shown genuine issues of material fact. Finding

much of the evidence inadmissible, the district court ruled that Avirgan and Honey failed to prove that the appellees were the proximate cause of their injuries and granted appellees' motions for summary judgment on the federal and state law claims.[2]

The district court, by a subsequent order, granted appellees' motions for costs and attorney's fees, ruling that the abuse of the judicial process required that Avirgan and Honey make the appellees whole by paying the fees the appellees were forced to spend in defending the lawsuit. Moreover, the district court ruled that liability for costs and fees rests jointly and severally with Avirgan and Honey, Daniel Sheehan (Avirgan and Honey's lawyer) and the Christic Institute.[3]

On appeal, this court consolidated appellants appeals of the district court's (1) grant of summary judgment; (2) the award of attorney's fees and costs; (3) motions for clarification order; and (4) the clarification order.[4]

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[2] Avirgan and Honey do not challenge the grant of summary judgment on the state law claims. As such, we deem those claims abandoned. *Rogero v. Noone*, 704 F.2d 518, 529 n. 1 (11th Cir.1983).

[3] The Christic Institute is a tax-exempt law firm which funded the litigation.

[4] The appeal on the merits is 88-5720; the other three appeals are from the district court's orders on fees (89-5143, 89-5232, and 89-5515).

On appeal, numerous persons and entities appeared, through brief, as amicus curiae, including: Church of the Brethren, Church Women United, Conference of Major

## CONTENTIONS

Avirgan and Honey contend that the district court ruled improperly in granting summary judgment, in issuing certain orders prior to summary judgment, and in denying relief for cost of injury and equipment due to the bombing. Additionally, Avirgan, Honey, the Christic Institute, and Daniel Sheehan challenge the award of costs and attorneys' fees.

The issues presented on appeal are: (1) whether the district court properly granted summary judgment on the ground that the appellants failed to show that the appellees caused their injuries; (2) whether the district court erred in issuing certain orders prior to summary judgment; and (3) whether the district court erred in awarding attorneys' fees and costs to the appellees.[5]

## DISCUSSION

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Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious, the Maryknoll Fathers and Brothers, General Conference Mennonite Church, National Council of Churches of Christ in the U.S.A., Unitarian Universalist Association, the Womens Division of the United Methodist Board of Global Ministries; Professor Melissa Nelken, Professor Carl Tobias, Professor Mary Twitchell, Trial Lawyers for Public Justice, and Public Citizen and Alliance for Justice.

[5] Avirgan and Honey also request damages for injuries and ask that if the case is remanded for further proceedings, the proceeding not be conducted by Chief Judge James L. King. Since we affirm the district court, these issues are moot.

1. Summary Judgment

**[1,2]** Consideration of the district court's grant of summary judgment requires plenary review and application of the same legal standards that bound the district court. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1527 (11th Cir.1987). If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(e). A nonmoving party, opposing a motion for summary judgment supported by affidavits cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial. *Fontenont v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir.1986). The evidence presented cannot consist of conclusory allegations or legal conclusions. *First National Bank of America v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

A. RICO Claim

**[3]** Avirgan and Honey's RICO claim is founded upon 18 U.S.C. § 1964(c).[6] Thus, they must prove three essential elements: (1) a violation of section 1962; (2) injury to business or property; and (3) that the violation caused the

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[6] Title 18 U.S.C. § 1964(c) reads as follows:
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

injury. *O'Malley v. O'Neill* 887 F.2d 1557, 1561 (11th Cir. 1989).

> Sections 1962(a), (b), and (c) of title 18 make criminally liable those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate section 1962(a), (b), or (c). [Footnote omitted.]

*Pelletier v. Zweifel*, 921 F.2d 1465, 1495-96 (11th Cir.1991).

1. Evidence

As to the evidence Avirgan and Honey presented, the district court found:

> The plaintiffs have not made a showing of a genuine issue of material fact with respect to any of their allegations concerning the cause of their injuries. Causation is an essential element of a RICO action. Accordingly, the defendants who have moved are entitled to summary judgment.

*Avirgan*, 691 F.Supp. at 1377.

**[4]** Avirgan and Honey argue that they were not obligated to produce evidence gathered during pretrial discovery which demonstrated that Galil had committed the bombing and was

a member of the enterprise, that C-4 was an ingredient of the bomb, or that they and their news sources were threatened and had crimes committed against them. We disagree. The evidence Avirgan and Honey presented is scant, almost nonexistent, on the important issue of causation. Avirgan and Honey presented the *La Penca Report*, a publication they prepared, which concludes that Amac Galil, a/k/a Per Anker Hansen caused the bombing. The district court correctly determined that this evidence was inadmissible.

Also, Avirgan and Honey submitted a one-page translation of a five-page document the Costa Rican OIJ prepared. The OIJ, according to Avirgan and Honey, is the Costa Rican equivalent to the United States Federal Bureau of Investigation (FBI). The translation is uncertified, unsigned, and does not conclude that Galil was responsible for the bombing. It merely concludes that debris found at the sire of the bombing matched that of a box Galil carried. This evidence is circumstantial, speculative, and of little weight.

Avirgan and Honey further argue that because none of the appellees disputed Galil's role in the bombing, summary judgment was improper. According to Avirgan and Honey, although some appellees claim that they did not know Amac Galil or have direct or indirect contact with him, this does not mean that all of the appellees are unassociated with the enterprise. In other words, Avirgan and Honey argue that no one has disproved Galil's existence, or disproved the existence of the enterprise, or disproved Galil's association with the enterprise. Thus, say Avirgan and Honey, the enterprise existed; Galil existed; Galil set off the bomb; and we were injured.

[5] Avirgan and Honey note that this circuit has ruled that a RICO enterprise may be an "amoeba-like" structure or a loose informal association. See *United States v. Cagnina*, 697

F.2d 915, 921 (11th Cir.1983), *cert. denied*, 464 U.S. 856, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983). We have so held. Nevertheless, Avirgan and Honey presented no evidence to indicate that Galil committed the bombing or was a part of the alleged enterprise. No admissible evidence was ever produced to show that Galil even existed.[7] The evidence completely failed. Galil was never served with a complaint or scheduled for deposition. All parties realized that responsibility for the La Penca bombing was a key issue on summary judgment. Yet, Avirgan and Honey, after years of discovery, brought forth nothing on the causation issue.

**[6]** Likewise, without submitting admissible evidence, Avirgan and Honey alleged that the appellees were liable for threats to and the kidnapping of Carlos Rojas Chinchilla and the murder of "David." According to Avirgan and Honey, Chinchilla and David served as their informants about the bombing. They specifically named Hull, Jones, Corbo, Vidal, Chanes, Nunez, Cruz, Saenz, Posey, Owen, and Palacio as participants in the crimes against David and Carlos, both individually and through agents. Avirgan and Honey assert that only three appellees, Hull, Owen, and Jones, moved for summary judgment.[8] They argue that Owen was in Central

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[7] At one point, Avirgan and Honey argue that Theodore Shackley's counsel admitted Galil's existence. Shackley's counsel's statement was, "I don't believe that the plaintiffs have any proof that any of the defendants was engaged in the La Penca bombing or connected to the La Penca bombing other than this fellow that they describe as Amac Galil." This statement is not evidence that counsel admitted Galil's alleged role in the bombing.

[8] The following persons filed motions for summary judgment: Jones, Owen, Hull, Calero, Singlaub, Shackley, Martin, McCoy, Quintero. Delamico, Clines, Hakim, and

America at the time of an execution of a "Sandinista informant" believed to be David. According to Avirgan and Honey, it was Owen's responsibility to demonstrate that the executed Sandinista informant was not David, or prove that he had no knowledge of, or did not condone the execution. It is their theory that the omission of this evidence, which Owen did not produce, should serve as a favorable inference for them. *Lampkin v. Liberia Athene Transport Co., Ltd.*, 823 F.2d 1497, 1499 (11th Cir.1987). This absence of evidence does not result in a favorable inference.

Avirgan and Honey further contend that Hull, Jones, Corbo, Vidal, Chanes, Nunez, Cruz, Saenz, Posey, and Owen threatened to murder them because they connected Hull and Vidal to the threats against their family. Again, theories, allegations, and speculation; but, no evidence.

2. Causation

[7] In a civil RICO action, the plaintiff must prove that the criminal conduct in violation of section 1962 directly or indirectly injured the plaintiff's business or property. *Haroco v. American Bank and Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir.1984), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

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Secord. Gonzalez filed an untimely summary judgment motion.

Defendants Santiago, Palacio, Galil, Cruz, Escobar, and Ochoa were never served and were dismissed.

Nine defendants did not move for summary judgment: Corbo, Nunez, Chanes, R. Gris, W. Gris, Pallais, Cornillot, Saenz, and Posey. Nunez moved, after the pretrial conference, to vacate the entry of default against him and to quash the service of process.

[8] Avirgan and Honey emphasize that the district court was required to provide them with notice of its intention to consider the causation issue, and it did not do so. We reject this argument. Appellees' numerous summary judgment motions presented the causation issue. For example, Owen's summary judgment motion asserted that no evidence supported the theory that Galil was linked to the bombing or to the alleged enterprise. In this motion, Owen also challenged whether any evidence supported the kidnapping of Chinchilla, the kidnapping and threatening of David, the threats to murder (Chinchilla, David, Avirgan, Honey), and the attempted assassination of Pastora.

In practically every motion for summary judgment, the appellees asserted that they had no involvement, directly or indirectly, in the La Penca bombing, that they were not the cause of any of the injuries, and that they were not and had never been members of an alleged enterprise. The appellees' affidavits, answers to interrogatories, and depositions put Avirgan and Honey on notice that causation was a principal issue. Consequently, the district court acted properly in granting summary judgment on the ground that Avirgan and Honey failed to prove that the appellees caused the injuries.

[9] Avirgan and Honey's additional allegation is that Galil used C-4 explosives in the La Penca bombing. For this assertion, they rely upon the deposition of Fernando Cruz Castro. The district court found that Avirgan and Honey evidently asked Cruz Castro to recall a letter or some other writing which suggested that Per Anker Hansen (Galil) committed the La Penca bombing. Cruz Castro's affidavit seeks to recite the contents of the letter or other writing from memory. The district court found, and we agree, that Cruz Castro's affidavit was not admissible. No other evidence linked Galil or any appellee to C-4 explosives.

B. Discovery

Avirgan and Honey also contend that the district court erred in granting summary judgment because the appellees had not complied with discovery requests or the court's orders compelling discovery. The record does not support this contention. All appellees, except Corbo, submitted affidavits, answered interrogatories, and/or provided sworn depositions denying responsibility, directly or indirectly, for the La Penca bombing. Owen, Singlaub, and Calero gave lengthy and complete depositions; Hull and Secord gave incomplete depositions because of Avirgan and Honey's delay in setting dates; Posey, Quintero, and Hakim invoked their fifth amendment privilege; Shackley and Clines were never noticed for deposition. All appellees served with interrogatories responded, and all appellees who moved for summary judgment submitted sworn affidavits. Furthermore, Avirgan and Honey had the benefit of public information generated by the Iran/Contra affair, including the extensive testimony of Secord, Hakim, Owen, Singlaub, Calero, and numerous other witnesses in public hearings.

**[10]** In this RICO proceeding which involves some alleged criminal activity, Avirgan and Honey should have anticipated that some appellees would impose their fifth amendment rights. Invocation of the amendment privilege did not give rise to any legally cognizable inferences sufficient to preclude entry of summary judgment. The negative inference, if any, to be drawn from the assertion of the fifth amendment does not substitute for evidence needed to meet the burden of production. *United States v. Rylander*, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983). Most importantly, Avirgan and Honey did not demonstrate that further discovery would have led to evidence which would have precluded summary

judgment based on causation.[9]

II. Orders Prior to Summary Judgment

**[11]** Avirgan and Honey also contend that the district court erred in the issuance of orders prior to summary which restricted discovery and denied them the right to file a third amended complaint. We review these claims under an abuse of discretion standard. *Edward Leasing Corp. v. Uhlig and Associates, Inc.*, 785 F.2d 877 (11th Cir.1986).

A. Discovery Limitations

Avirgan and Honey contend that the district court's order restricting discovery to evidence for the period 1983 through 1986 of only one venture of the alleged RICO enterprise, and only those subjects related to the La Penca bombing, deprived them of an opportunity to conduct adequate discovery.

**[12]** Despite these assertions, prior to filing the first complaint, Avirgan and Honey boasted of a two-year investigative period, and after filing enjoyed an additional two years of discovery. Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied. *Aviation Specialties, Inc.*

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[9] Avirgan and Honey had two years to conduct discovery and seven and one-half months advance warning of the discovery cut-off date. Knowing this, they took absolutely no discovery during the first nine months after filing the case and little more until January, 1988. During the final 4 1/2 months of discovery, Avirgan and Honey filed 153 deposition notices. It is clear that Avirgan and Honey's actions caused delay in discovery, not the appellees.

*v. United Technologies Corp.*, 568 F.2d 1186, 1189 (5th Cir.1978).

**[13]** Thus, the time and subject matter restrictions imposed by the district court did not deprive Avirgan and Honey of an opportunity to conduct adequate discovery. Moreover, the order did not prohibit discovery into causation, which was the dispositive issue. The district court has wide discretion in determining the scope and effect of discovery, and it did not abuse its discretion when it imposed time and subject matter restrictions in this case. *See Amey, Inc. v. Gulf Abstract and Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir.1985), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).

B. Third Amended Complaint

**[14]** Avirgan and Honey also challenge the district court's denial of their motion to file a third amended complaint. Avirgan and Honey acknowledge that the third amended complaint would not have altered the claims against the appellees or added new parties, causes of action, or additional relief. Consequently, a third amended complaint was unnecessary. Avirgan and Honey needed proof, not more pleadings. The district court did not abuse its discretion in denying the filing of a third amended complaint.

III. Attorneys' Fees

In its order awarding costs and attorney's fees, the district court stated:

> The attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint. Plaintiffs' lead counsel, Daniel Sheehan,

supplemented the complaint with a detailed affidavit outlining the purported testimony of seventy-nine witnesses who Mr. Sheehan stated had factual knowledge that these defendants set and exploded the bomb that caused plaintiff's injuries.

The seventy-nine witnesses were identified only by number. Plaintiffs' counsel refused to identify the names and addresses of the vast majority of the seventy-nine witnesses until ordered to do so by the court. Plaintiffs appealed the order requiring them to disclose the identities of the witnesses. These actions by plaintiffs and their counsel prevented the defendants from taking depositions of these witnesses, and delayed orderly discovery for many months.

After all the appeals were exhausted and plaintiffs complied with the order to reveal the names of their witnesses, the reason for the plaintiffs' adamant refusal became apparent. Specifically, the names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or the plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statements that would be admissible. Much of the testimony of these witnesses involved conversations they allegedly had with other people, which is the hearsay testimony inadmissible at a trial.

*Avirgan v. Hull*, 705 F.Supp. 1544, 1545 (S.D.Fla.1989). Avirgan and Honey do not dispute the district court's statements. The other appellants, in the fee portion of the case, do not dispute the statements.

The district court awarded costs to the appellees pursuant to Federal Rule of Civil Procedure 54(d), and 28 U.S.C. § 1920, which lists the items that may be reimbursed as costs.[10] Avirgan and Honey argue that what the attorneys "must have known" is not the proper standard for the grant of attorneys' fees, but is the standard for the imposition of sanctions. Thus, in their opinion, the district court impermissibly "guised its Rule 11 sanctions as a grant of summary judgment."

Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit

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[10] Federal Rule of Civil Procedure 54(d) provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.
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> Title 28 U.S.C. § 1920 provides:
>
> Taxation of costs
>
> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal:
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

that the complaint was well-grounded in fact.[11] Particularly is this true of the affidavit with its unknown, nonexistent, deceased sources, its fabricated testimony, and the deceptive style used to mask its shortcomings. It is obvious that if the appellants knew (must have known) prior to filing this lawsuit that they had no competent evidence, then, this complaint was not well-grounded. Additionally, the district court stated in its order granting attorney's fees and costs that Sheehan's affidavit was the impetus for the two years of discovery. Yet, this discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing.

**[15,16]** In its clarification order, the district court explained that Daniel Sheehan, as lead counsel, and the

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[11] Federal Rule of Civil Procedure 11, in pertinent part provides:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Christic Institute, as the official law firm, were liable pursuant to the bad-faith exception, 28 U.S.C. § 1927, and Federal Rule of Civil Procedure 11, while Avirgan and Honey, as willful participants in Sheehan's litigation strategy, were liable under the bad-faith exception.[12] 125 F.R.D. 189. A court may assess attorney's fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith. *Roadway Express Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). On this record, we have no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings.[13] It is well established that:

> Although a litigant proceeding in good faith has a right to use civil discovery in attempts to prove the existence of a colorable claim for relief, filing a lawsuit is not a gratuitous license to conduct infinite forays in search of evidence. When it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest.

*Collins v. Walden*, 834 F.2d 961, 965 (11th Cir.1987). Since

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[12] Title 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

[13] At oral argument, appellants admitted they had spent more than $2 million on this case although, under the best scenario, they did not expect to collect half that amount.

Sheehan, the Christic Institute, Avirgan, and Honey chose not to abandon this case, the district court properly awarded attorney's fees and costs to the appellees.

**[17]** Furthermore, the district court's order does not infringe upon the appellants' right of access to the courts, or first amendment rights of free association, or Sheehan's professional obligation to represent clients zealously. Status as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits. *See Roadway Express*, 447 U.S. at 762, 100 S.Ct. at 2462; *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986). Accordingly, we affirm the district court's award of attorney's fees and costs.

## CONCLUSION

Accordingly, we affirm the judgments of the district court.

AFFIRMED.

[Entered 2 February, 1989]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1146-CIV-KING

TONY AVIRGAN and MARTHA HONEY,

Plaintiffs,

v.

JOHN HULL, et. al.,

Defendants.
_____/

ORDER GRANTING MOTIONS FOR COSTS AND ATTORNEYS' FEES

Tony Avirgan was injured by the explosion of a bomb in the jungle at La Penca, Nicaragua. He accused the defendants of exploding the bomb in an attempt to assassinate Eden Pastora, a contra leader. After two years of protracted and extensive discovery of scores of witnesses across the United States, Costa Rica, and elsewhere, the plaintiffs were unable to produce a single witness who could state that the defendants exploded the bomb or were responsible for the assassination attempt. See Avirgan v. Hull, 691 F.Supp 1357 (S.D. Fla. 1988).

The attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint. Plaintiffs' lead counsel, Daniel Sheehan,

supplemented the complaint with a detailed affidavit outlining the purported testimony of seventy-nine witnesses who Mr. Sheehan stated had factual knowledge that these defendants set and exploded the bomb that caused plaintiff's injuries.

The seventy-nine witnesses were identified only by number. Plaintiffs' counsel refused to identify the names and addresses of the vast majority of the seventy-nine witnesses until ordered to do so by the court. Plaintiffs appealed the order requiring them to disclose the identities of the witnesses. These actions by plaintiffs and their counsel prevented the defendants from taking depositions of these witnesses, and delayed orderly discovery for many months.

After all the appeals were exhausted and plaintiffs complied with the order to reveal the names of their witnesses, the reason for the plaintiffs' adamant refusal became apparent. Specifically, the names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or the plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statements that would be admissible. Much of the testimony of these witnesses involved conversations they allegedly had with other people, which is the hearsay testimony inadmissible at a trial.

Based upon the affidavit of plaintiffs' counsel, the plaintiffs were permitted to conduct two years of discovery. This discovery failed to produce any admissible evidence regarding causation. See Avirgan, 691 F.Supp 1357. The Christic Institute's allegations, essentially maintaining that the plaintiffs were victims of a wide-ranging conspiracy spanning thirty years and involving the activities of former United

States Government officials, CIA operatives, Colombian druglords and arms merchants in Cuba, Southeast Asia, the Middle East, and Central America, were based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge. These actions establish that plaintiffs "had every reason to know they stood no chance of proving" that the defendants were responsible for the injuries to Tony Avirgan. Collins v. Walden, 834 F.2d 961, 964 (11th Cir. 1987). This abuse of the judicial process requires that the plaintiffs make the defendants whole by paying the fees the defendants have been forced to expend for attorneys in this action. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Collins, 834 F.2d at 964; Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983); see also 28 U.S.C. § 1927 (1986).

## DISCUSSION

The motions for costs and attorney's fees filed by the prevailing defendants are the last remnants of this case. The court now addresses the questions raised by these motions.

### A. COSTS

Normally, an award of costs is relatively straight forward. Federal Rule of Civil Procedure 54(d) provides that a court may tax costs in favor of the prevailing party. The particular costs that can be taxed are detailed in 28 U.S.C. § 1920. This section expressly provides that the following items may be taxed as costs:

1) Fees of the clerk and marshal;
2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
3) Fees and disbursements for printing and witnesses;

4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
5) Docket fees under section 1923 of this title;
6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Some of the successful defendants have filed Bills of Costs. Although the plaintiffs have failed to make specific objections to requested costs, the court will analyze the requests and determine the appropriate amounts based on the statutory guidelines. Specifically, the court will disallow "costs" that are not set out in 28 U.S.C. § 1920. See Crawford Fitting Company v. J. T. Gibbins, Inc., 107 S.Ct 2494 (1987).

1. ADOLFO CALERO

Defendant Calero filed an affidavit listing costs totalling $1,935.64. The affidavit states that the following costs have been expended in connection with the defense of this case:

| DISBURSEMENTS | AMOUNT |
|---|---|
| Messenger Service | $80.00 |
| Postage | 102.94 |
| Photocopies | 1,225.65 |
| Parking | 10.10 |
| Mileage | 1.20 |
| Telefax Transmissions | 34.00 |
| Word processing costs | 280.00 |
| Depositions | 201.75 |
| TOTAL DISBURSEMENTS: | $1,935.64 |

The statutory provision does not provide for the taxation of messenger service, postage, parking, mileage, telefax and

word processing costs, so the court disallows the requested costs. The request for "deposition" costs presumably is for costs incident to taking a deposition. The court, consequently, taxes as costs the "deposition" and the photocopying of depositions. Plaintiff Calero, therefore, is awarded $1,427.40 in costs.

2. JOHN HULL

Hull has listed four types of costs in his Bill of Costs. He requests the following costs:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Fees for exemplification and copies of papers necessarily obtained for use in case | $1,058.75 |
| Costs incident to taking of depositions | 1,602.70 |
| Long distance phone expense | 148.98 |
| Postage | 204.82 |
| TOTAL DISBURSEMENT: | $3,015.25 |

Because 28 U.S.C. § 1920 does not provide for them, the court disallows the long distance phone charges and again denies the postage costs. The defendant is entitled to $2,661.45 in taxable costs.[1]

3. MOISES NUNEZ RUIZ

Nunez Ruiz has listed two expenses, both of which are

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[1] This defendant, like several others, has filed a motion under Rule 30(g)(2) for fees and cost. The defendant, however, has not listed these expenses, so the court presumes the amount allowed under 30(g)(2) is included in the total request.

enumerated in § 1920. Specifically, he has made the following requests:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Fees for printing | $644.85 |
| Translating services | 92.00 |
| TOTAL DISBURSEMENT | $736.85 |

The prevailing defendant is entitled to these specifically enumerated costs totalling $736.85.

4. ROBERT OWEN

Defendant Owen submitted a Bill of Costs that contained the following two items:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Fees for copies of papers necessarily obtained for use in the case | $2,844.00 |
| Costs incident to taking of depositions | 2,774.90 |
| TOTAL DISBURSEMENTS | $5,663.90 |

The defendant provided detailed attachments to indicate the necessity of these items. The court, accordingly, awards costs totalling $5,663.90 for defendant Owen.

5. RICHARD SECORD

The following requests were filed by defendant Secord:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Transcripts | $2,925.30 |
| Xeroxing | 2,283.10 |
| Courier Service | 958.95 |

| | |
|---|---|
| Telecopy and Telex | 225.00 |
| Postage | 401.88 |
| Telephone | 834.75 |
| Travel Expenses | 7,112.04 |
| TOTAL DISBURSEMENTS: | $14,741.02 |

Because the statute does not allow courier services, telecopy, telex, postage, telephone, and travel expenses, these amounts are disallowed. The request for transcripts and xeroxing expenses is appropriate, so the defendant is entitled to $5,208.40 for costs.

6. RONALD MARTIN, JAMES McCOY and MARIO DELL AMICO

All three defendants were represented by the same law firm. The attorney stated in the Bill of Costs that costs incident to taking of deposition and the copying is $4,373.85. These requests are entirely appropriate and the court grants the request. The defendants also ask for the following other costs:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Air Fare | $154.00 |
| Long distance telephone | 365.98 |
| Messenger service | 230.90 |
| Postage | 128.25 |
| Secretarial overtime | 200.98 |
| Telecopying | 232.00 |
| Parking and other miscellaneous costs | 140.48 |
| Legal research costs | 157.50 |
| Word processing costs | 42.00 |
| Word processing overtime | 45.00 |
| TOTAL DISBURSEMENT: | $1,647.04 |

Section 1920 does not provide for any of these costs, so they are all disallowed. Consequently, the court awards only $4,373.85.

7. RAFAEL QUINTERO, THOMAS CLINES and ALBERT HAKIM

Like the previous defendants, Quintero, Clines and Hakim all retained one law firm. The law firm submitted the following list of costs:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Xeroxing | $1,167.00 |
| Courier services | 144.40 |
| Telephone and telecopy | 193.17 |
| Postage | 162.73 |
| Travel expenses | 2,162.47 |
| 5% Fla. Sales Tax 7/1 - 12/31/87 | 8.12 |
| TOTAL DISBURSEMENTS: | $3,837.89 |

All of these expenses, except xeroxing, are disallowed because they fall outside the statute. The court does allow the photocopying expenses totalling $1,167.00 as recoverable costs.

8. JORGE GONZALEZ

Through an attorney's affidavit, defendant Gonzalez requests the following necessarily incurred disbursements:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Postage | $65.25 |
| Long distance telephone calls | 12.34 |
| Courier services | 16.85 |
| Photocopies | 798.30 |
| TOTAL DISBURSEMENTS: | $892.74 |

Most of the requested costs are not within the statutory provision. The only recognized cost is for photocopying. Accordingly, the court taxes as cost $798.30 for photocopies.

9. JOHN SINGLAUB

Defendant Singlaub vigorously defended against this case and, consequently, has submitted two Bills of Costs totalling more than $100,000. The list of costs, consisting of 28 pages, can be summarized as follows:

| DISBURSEMENTS | AMOUNTS |
|---|---|
| Fees of court reporter for transcripts necessarily obtained for use in the case | $24,698.48 |
| Fees and disbursements for printing | 2,194.74 |
| Fees for witnesses | 177.00 |
| Fees for exemplification and copies of papers necessarily obtained for use in case | 19,271.59 |
| Docket fees under 28 U.S.C. § 1923 | 20.00 |
| Long distance phone calls | 3,241.49 |
| Witness subpoenas | 280.00 |
| Postage and delivery | 16,919.82 |
| Overtime office expenses | 6,300.50 |
| Interpreter costs | 168.76 |
| Travel expenses | 30,875.09 |
| Miscellaneous | 4,469.89 |
| TOTAL DISBURSEMENTS | $108,617.36 |

Despite the defendant's detailed report, the plaintiffs failed to specifically object. The court, however, is guided by the statutory guidelines set forth in § 1920 and disallows the requests not listed in the statute. The defendant, consequently, is not entitled to expenses for long distance phone calls, witness subpoenas, postage, delivery, overtime

staff, travel and miscellaneous cost. With these costs deleted, the defendant's total allowed amount is $46,530.57.

In addition to the costs allowed under Rule 54(d), the defendant has submitted a request for costs and fees under Rule 30(g)(2) based on the plaintiffs' failure to properly subpoena witnesses noticed for deposition or otherwise adequately arrange for their attendance at the depositions in Costa Rica.[2] Because of the plaintiffs' failure, defendant Singlaub incurred the following expenses:

| DATE | DESCRIPTION | AMOUNTS |
|---|---|---|
| 5-1-88 | Airfare Miami/San Jose, C.R. | $280.00 |
| 5-1-88 | Departure Tax | 10.00 |
| 5-1-88 | Attorney's Fees/Preparation for Depositions | 400.00 |
| 5-2-88 | Attorney's Fees/Wasted Day | 800.00 |
| 5-2-88 | Two Meals | 14.00 |
| 5-2-88 | Transcript of Proceedings and Appearance | 127.50 |
| 5-4-88 | Hotel Bill | 105.00 |
| 5-4-88 | Cab ride to airport | 10.00 |
| 5-4-88 | Departure Tax | 4.50 |
| 5-4-88 | Airfare San Jose/Miami | 280.00 |
| 5-4-88 | Attorney's Fees/Travel Time | 400.00 |
| 7-8-88 | Attorney's Fees/Preparation of this Motion | 100.00 |

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[2] The transcript of the deposition demonstrates that the plaintiffs did not take the appropriate measures to insure the witnesses' attendance at the deposition. The court finds that Rule 30(g)(2) of the Federal Rules of Civil Procedure applies and the plaintiffs should compensate the defendants for these unnecessary expenses.

TOTAL $2,531.00[3]

The court grants all of these expenses, so the defendant's total amount allowed is $49,061.57.

10. THEODORE SHACKLEY

Defendant Shackley has filed a Bill of Costs for $20,330.06. The defendant requests the court to tax the following as costs:

| DISBURSEMENT | AMOUNT |
|---|---|
| Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case | $795.50 |
| Fees for witnesses | 35.00 |
| Fees for exemplification and and copies of papers necessarily obtained for use in the case | 8,072.14 |
| Computer legal research | 5,189.99 |
| Travel | 2,043.11 |
| Telephone and telecopier | 963.59 |
| Postage and delivery | 1,601.68 |
| Staff overtime | 615.30 |
| Interlibrary loans | 153.83 |
| Miscellaneous | 859.92 |
| TOTAL DISBURSEMENTS | $20,330.06 |

Section 1920 does not provide for computerized legal

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[3] The attorneys' fees listed here will be deleted from the court's consideration in awarding attorneys' fees in section B of this order.

research,[4] travel expenses, telephone, telecopier, postage, delivery, staff overtime, interlibrary loans, nor miscellaneous requests, so the court denies these amounts. Defendant Shackley, therefore, is entitled to the remaining items totalling $8,402.14.

## B. ATTORNEYS' FEES

As stated in the introduction, the court has also decided to award attorneys' fees to the prevailing defendants.[5] The court, therefore, now must determine a reasonable hourly rate for each defendant's attorney and assess the time claimed by the attorneys. Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988). The decision regarding the appropriate hourly rate may be made either by analyzing the affidavits submitted by counsel or, if this documentation is insufficient, by relying upon the court's expertise. Id. at 1304. Likewise, the determination of hours reasonably expended may be based on documentation or, if this evidence is inadequate, the court's own exprience. With these principles in mind, the court will address each defendant's request.

### 1. ADOLFO CALERO

The law firm that represented defendant Calero has requested fees totalling $57,676.75. Based on an affidavit filed by an attorney not affiliated with the firm, the court

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[4] See also Roberts v. Charter National Life Ins., 112 F.R.D. 411 (S.D. Fla. 1986)

[5] This award is made coextensively pursuant to the "bad faith" exception to the American Rule, see Alyeska Pipeline Service Co., 421 U.S. 240 (1970), 28 U.S.C. § 1927 (1986), and Fed. R. Civ. P. 11.

finds that the rates attributed to the three lawyers are reasonable by comparison in this legal community. Specifically, the rates of $150.00 per hour for an attorney with eight years experience, $200.00 per hour for a lawyer with eighteen years experience, and $85.00 per hour for a newly admitted attorney are reasonable.

In addition to finding the hourly rate reasonable, the court also believes that the time claimed is reasonable. Although the attorneys have not specifically documented the hours expended, the court's experience with this case and similar cases compels the court to find the total award reasonable. The court inferentially finds the hours worked reasonable. Defendant Calero, therefore, is entitled to $57,676.75 in attorney's fees.

2. JOHN HULL

The attorney for John Hull apparently charged the client based on a local rate of $100.00 per hour and an out-of-town rate of $150.00 per hour. The court, in its experience, disallows the differential rates and, consequently, applies the local rate of $100.00 per hour to all of the attorney's entries. The detailed entries reasonably portray the amount of hours expended by the attorney. Based on the uniform rate of $100.00 per hour, defendant Hull is entitled to fees totalling $67,380.00.

3. MOISES NUNEZ RUIZ

Counsel for the defendant filed an affidavit that states he has been admitted to practice in Florida for approximately 13 years and charges $150.00 per hour. The court, again, finds this hourly rate reasonable. Counsel has also clearly identified the services he has rendered for his client. The itemized services bill indicates that counsel spent a

reasonable amount of time on the case, so the court awards attorney's fees in the amount of $4,913.52.

4. ROBERT OWEN

Defendant Owen, represented by a District of Columbia law firm, requests attorneys fees totally $67,509.10. Several attorneys within the law firm represented Mr. Owen, but 94% of the work was performed by an attorney with 13 years of experience, who charged initially $135.00 per hour and ultimately $165.00 per hour. The court finds these rates reasonable based on the attorney's experience and the locale in which he practices. Moreover, the court, after reviewing the time sheets, finds the number of hours expended to be reasonable. Mr. Owen, therefore, is entitled to $67,509.10 in attorneys' fees.

5. RICHARD SECORD

The affidavit submitted by counsel is fairly broad, but based on the documentation and the court's experience, the requested amount for attorneys' fees is reasonable. Specifically, the range of hourly rates was between approximately $75.00 per hour to $190.00 per hour. Moreover, in light of the multiple appearances of counsel and numerous documents filed in this case, the number of hours expended by the law firm is reasonable. The court, consequently, awards attorneys' fees totalling $109,854.00.

The defendant has also requested $16,742.67 for attorneys' fees based on a consultation with another law firm regarding RICO law. The request, however, only states that the fees total $16,742.67. The request does not mention an hourly rate nor hours expended. Despite the court's expertise, it cannot merely guess at an appropriate amount. This request, therefore, is denied.

6. RONALD MARTIN, JAMES McCOY and MARIO DELL AMICO

One law firm represented all three defendants in this litigation. The rates for the attorneys in this case range from $65.00 per hour for associates to $225.00 per hour for a senior partner. The court finds these rates reasonable. With respect to the time billed, the one-inch thick stack of the billing sheets more than adequately details the activities of all of the attorneys involved. The court, therefore, grants the request for fees totalling $79,336.88.[6]

7. RAFAEL QUINTERO, THOMAS CLINES, and ALBERT HAKIM

All three defendants were represented by one law firm. Additionally, Quintero retained separate trial counsel. The documents in the case, including the motion for attorneys' fees, were signed by the law firm representing the three defendants. Consequently, based on the previous filings of the attorneys and their appearances in court, the court can supplement the inadequate affidavit of the firm that represented all three defendants. Moreover, the attached affidavit regarding hours worked and hourly rates is consistent with the court's experience and the other defendants' requests. Conversely, the affidavit submitted by trial counsel for Quintero is insufficient and the court is unfamiliar with counsel because the case did not proceed to trial. The request for fees for trial counsel, consequently, is denied. The court, however, does award Quintero, Hakim and Clines $89,984.40 in attorneys' fees.

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[6] This amount reflects a $640.50 deduction from the defendants' request because of two accidentally placed billing entries.

8. JORGE GONZALEZ

The court is confronted with another insufficient affidavit regarding hours worked and hourly rate. The court, again relying on its experience and expertise, finds the attorneys' hourly rate and hours expended reasonable. Consequently, the request for 283.9 hours at $150.00 per hour totalling $42,585.00 is granted.

9. JOHN SINGLAUB

Singlaub's attorney filed forty-eight pages of billing sheets detailing the tremendous number of hours expended in this case. Moreover, the documentation and accompanying affidavits indicate that the attorneys charged reasonable hourly rates of $100.00 per hour for associates and $175.00 per hour for partners. Combining these hourly rates with the 2062 hours expended in the case, defendant Singlaub is entitled to $297,446.75 in attorneys' fees. Because the court previously awarded $1,200.00 of these fees under Rule 30(g)(2), the amount awarded here is reduced to $296,246.75.[7]

10. THEODORE SHACKLEY

Defendant Shackley hired a Washington, D.C. law firm to represent him in this action. The law firm has complied with every requirement of Norman. Specifically, the attorneys have fully detailed the activities of the lawyers involved in the case and listed the hourly rate of each

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[7] Defendant Singlaub also retained two other lawyers. Unlike the attorneys awarded approximately $300,000.00, these attorneys did not provide the court any basis to determine an appropriate award. Their requests, therefore, are denied.

attorney.[8] Moreover, the fee petition is "well-prepared" because it includes a summary of each attorney's hours and a monthly listing of fees. See Norman, 836 F.2d at 1303. In light of the reasonable hourly rates and reasonable hours expended, the court awards defendant Shackley attorneys' fees totalling $139,844.10.

11. THOMAS POSEY

Defendant Posey, currently representing himself, has filed a motion for attorney's fees with the amount to be determined at a later date. Because the defendant is pro se, the court will allow him until February 24, 1989 to file an itemized description of his previous attorney's hourly rates and hours expended on this case.

Based on the previous discussion, the court

ORDERS and ADJUDGES that the defendants are entitled to the following amounts:

| | ATTORNEYS' FEES | COSTS | TOTAL |
|---|---|---|---|
| CALERO | $ 57,676.75 | $ 1,427.40 | $ 59,104.15 |
| HULL | 67,380.00 | 2,661.45 | 70,041.45 |
| NUNEZ RUIZ | 4,413.52 | 736.85 | 5,150.37 |
| OWEN | 67,509.10 | 5,663.90 | 73,173.00 |
| SECORD | 109,854.00 | 5,208.40 | 115,062.40 |
| MARTIN, McCOY, DELL AMICO | 79,336.88 | 4,373.85 | 83,710.73 |
| QUINTERO, CLINES, HAKIM | 89,984.40 | 1,167.00 | 91,151.40 |

[8] The attorneys have also attached an affidavit stating that the hourly rates are reasonable in these types of cases.

| | | | |
|---|---|---|---|
| GONZALEZ | 42,585.00 | 798.30 | 43,383.30 |
| SINGLAUB | 296,246.75 | 49,061.57 | 345,308.32 |
| SHACKLEY | 139,894.10 | 8,402.14 | 148,296.24 |
| TOTAL | $954,880.50 | $79,500.86 | $1,034,381.36 |

FURTHER ORDERS and ADJUDGES that defendant Posey has until February 24, 1989 to file the appropriate documentation for determining the amount of attorneys' fees.

Let execution issue.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida this 2nd day of February, 1989.

/s/
JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

[Filed 27 February, 1989]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1146-CIV-KING

TONY AVIRGAN and MARTHA HONEY

Plaintiffs,

v.

JOHN HULL, et. al.,

Defendants.
_____/

ORDER CLARIFYING ORDER
DATED FEBRUARY 2, 1989

Defendants bring a motion to clarify this court's order of February 2, 1989. They seek to determine against whom the fees and costs where [sic] awarded. The plaintiffs have responded by arguing that a procedural bar divests this court's jurisdiction to reconsider this order.

The court finds no merit to the plaintiffs' contentions. They argue that their filing of a notice of appeal immediately divests this court of all jurisdiction over the order that is the subject of the appeal. Aside from the fact that this argument runs contrary to Fed. R. App. P. 12 and established precedent, the record reflects that the notice of appeal was actually filed the same day the motion for clarification was. Accordingly, the notice of appeal could not in fairness to all parties preempt this court's consideration of a motion filed that same day. Accordingly, the court will address the issues

raised in the defendants' motion.

As this court's order dated February 2, 1989 fairly indicates, liability for the costs and fees must rest jointly and severally with Daniel Sheehan, Esq., The Christic Institute, and the plaintiffs, Tony Avirgan and Martha Honey. The court now addressed [sic] the reasons underlying this decision.

As a preliminary matter, the court notes that the plaintiffs are confused over the court's use of the word "coextensively" in its February 2, 1989 order. In footnote 5 of that order, the court indicated that the award was made "coextensively" pursuant to the "bad faith" exception, 28 U.S.C. § 1927, and Fed. R. Civ. P. 11. This language indicates that each of these authorities, separate unto itself, support the entire award. Of course different legal standards govern the award under each authority. The court applied these differing standards and found that the entire award was supported in toto by Fed. R. Civ. P. 11, in toto by 28 U.S.C. § 1927, and in toto by the "bad faith" exception. Essentially, the award mechanism is logical, for an award pursuant to the "bad faith" exception or 28 U.S.C. § 1927 necessarily implies an award under Fed. R. Civ. P. 11 where many of the reasons for the bad faith award center around or relate back to signed pleadings that violated Fed. R. Civ. P. 11.

Daniel Sheehan, Esq. must be liable. He was lead counsel for the plaintiffs. He formulated and put into motion the litigation strategy and tactics that justified the entire award under the bad faith exception and 28 U.S.C. § 1927. He also signed the complaint and affidavit upon which the court justified the entire award under Fed. R. Civ. P. 11. Moreover, as lead counsel, he neglected his continuing obligation under all three authorities to assure that the allegations in the complaint and in the affidavit were borne

out in the discovery process. Mr. Sheehan is liable for the entire amount.

Similarly, The Christic Institute should be liable for the costs and fees. Mr. Sheehan, The Christic Institute's General Counsel, acted on behalf of the Institute. The Institute was the self-pronounced law firm representing the plaintiffs. Its attorneys carried out Mr. Sheehan's litigation strategy, and willingly participated in the litigation tactics. The Institute's name appears on all or most of the plaintiffs' filings. Moreover, because it acted through its officers, the attorneys representing the plaintiffs, the Institute must be held accountable for its agents' neglect of their continuing duty under all three authorities to avoid this frivolous lawsuit. The Christic Institute is liable for the entire award.

For like reasons, the plaintiffs, Tony Avirgan and Martha Honey, should be liable for the entire award. Admittedly, Honey and Avirgan cannot be liable under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927 because they are not attorneys. Nevertheless, they were willful participants in Mr. Sheehan's litigation strategy. The Christic Institute paid them approximately $50,000.00 for consultation, public speaking, and trips from Costa Rica to the United States. See Shackley's motion for sanctions and fees, Exhibit D (Avirgan Deposition at p. 297-302; Honey Deposition at p. 211-13). The plaintiffs, therefore, are liable for the award of costs under the bad faith exception, which is, the entire award.

Because Daniel Sheehan, Esq., The Christic Institute, and the plaintiffs are all liable for the award, they are jointly liable. Moreover, because each contributed to the actions in the defined manners, this liability is also several. Consistent with this opinion, the court

ORDERS and ADJUDGES that the award of fees and costs delineated in this court's order dated February 2, 1989 shall be paid by the plaintiffs Tony Avirgan and Martha Honey, the Christic Institute, and Daniel Sheehan, Esq. jointly and severally.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida this 24th day of February, 1989.

/s/

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

[9 September, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5720
NO. 89-5143
NO. 89-5232
NO. 89-5515

TONY AVIRGAN and MARTHA HONEY

Plaintiffs,

v.

JOHN HULL, et. al.,

Defendants.

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On Appeal from the United States District Court for the Southern District of Florida

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ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING EN BANC
(Opinion June 18, 1991, 11th Cir., 1991, __F.2d__)

Before HATCHETT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

( x ) The Petitions for Rehearing are DENIED and no

member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 16 1991
OFFICE OF THE CLERK

(4) (4) (2)

Nos. 91-617, 91-618, 91-619

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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TONY AVIRGAN, *et al.*,
*Petitioners,*

v.

JOHN HULL, *et al.*,
*Respondents.*

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## JOINT CONSOLIDATED BRIEF OF RESPONDENTS CALERO, CLINES, DELAMICO, GONZALEZ, HAKIM, HULL, MARTIN, McCOY, NUNEZ, OWEN, QUINTERO, SECORD, SHACKLEY, AND SINGLAUB IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the imposition of Rule 11 sanctions on Mr. Sheehan violated his Fifth and Sixth Amendment rights, where the district court found that the sanctioned attorney filed a complaint with no prospect of being able to prove his claims and made false representations to the court which were the basis on which two years of pretrial discovery proceeded.

2. Whether the Fifth Amendment's Due Process Clause required the district court to conduct an evidentiary hearing before imposing sanctions on Mr. Sheehan pursuant to the "bad-faith" exception of the American Rule, where the sanctions were based on the sanctioned attorney's own conflicting representations to the court and where, prior to imposition of the sanctions, the sanctioned attorney had received notice of the basis for the sanctions, submitted a written response of 40 pages, and never requested a hearing.

3. Whether the Fifth Amendment's Due Process Clause required the district court, when imposing sanctions on Mr. Sheehan pursuant to 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings, to make a specific finding of the proportion of the defendants' costs and attorneys' fees attributable to specific conduct, where the court found that the sanctioned attorney "must have known prior to suing that [he] had no competent evidence to substantiate the theories alleged" in the complaint and where his false representations to the court were the basis on which two years of pretrial discovery proceeded.

4. Whether there is a conflict between the district court's summary judgment and sanctions orders so that the entry of sanctions against Mr. Sheehan pursuant to Rule 11, 28 U.S.C. § 1927, and the "bad-faith" exception to the American Rule constitutes an abuse of discretion.

5. Whether the imposition of Rule 11 sanctions on the Christic Institute conflicts with this Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group* where the Christic Institute was a real party in interest in the litigation.

6. Whether the Christic Institute may be sanctioned under 28 U.S.C. § 1927.

7. Whether the Christic Institute may be sanctioned pursuant to the "bad-faith" exception to the American Rule.

8. Whether the Fifth Amendment's Due Process Clause required the district court to conduct an evidentiary hearing before imposing "bad-faith" sanctions on the Christic Institute where, prior to imposition of the sanctions, the sanctioned party had received notice of the basis for the sanctions, submitted a written response of 40 pages, and never requested a hearing.

9. Whether the district court abused its discretion when it imposed, pursuant to its inherent powers, "bad-faith" sanctions against plaintiffs Avirgan and Honey who "had every reason to know they stood no chance of proving" that the defendants caused their injuries and where they were "willful participants in [their attorney's] litigation strategy" and were paid for their participation in the litigation.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| RESPONSE TO PETITIONERS' STATEMENTS OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 4 |
| REASONS FOR DENYING THE WRITS | 5 |
| I. THE IMPOSITION OF RULE 11 SANCTIONS ON MR. SHEEHAN FOR FILING A GROUNDLESS SUIT AND FOR HIS MISREPRESENTATIONS IN SIGNED COURT PAPERS WAS WELL WITHIN THE DISTRICT COURT'S DISCRETION | 5 |
| A. The Rule 11 Sanctions Imposed On Mr. Sheehan Were Based On Not Only Lack Of Evidence But Also Misrepresentations To The District Court In And Involving His Affidavit | 5 |
| B. The District Court's Summary Judgment Order Is Not An Issue Before This Court And, In Any Case, Is Correct | 7 |
| II. THE ENTRY OF SANCTIONS AGAINST MR. SHEEHAN COMPLIED FULLY WITH DUE PROCESS REQUIREMENTS | 9 |
| A. Mr. Sheehan Waived An Evidentiary Hearing | 10 |
| B. The District Court's Sanctions Orders Specified The Sanctioned Conduct And Sanctioning Authority | 12 |
| III. THE DISTRICT COURT'S FINDINGS REGARDING THE IMPOSITION OF § 1927 SANCTIONS ON MR. SHEEHAN COMPLIED WITH DUE PROCESS REQUIREMENTS | 14 |

TABLE OF CONTENTS—Continued

Page

IV. THERE IS NO CONFLICT BETWEEN THE DISTRICT COURT'S SUMMARY JUDGMENT AND SANCTIONS ORDERS ..... 15

V. THE IMPOSITION OF RULE 11 SANCTIONS ON THE CHRISTIC INSTITUTE—A REAL PARTY IN INTEREST IN THIS CASE—IS NOT CONTRARY TO THIS COURT'S DECISION IN *PAVELIC & LEFLORE* ..... 16

VI. THE DISTRICT COURT'S IMPOSITION OF § 1927 SANCTIONS UPON THE CHRISTIC INSTITUTE DOES NOT MERIT REVIEW BY THIS COURT ..... 18

VII. THE DISTRICT COURT'S IMPOSITION OF BAD-FAITH SANCTIONS ON THE CHRISTIC INSTITUTE IS NOT CONTRARY TO *PAVELIC & LEFLORE* ..... 19

VIII. THE ENTRY OF SANCTIONS AGAINST THE CHRISTIC INSTITUTE COMPLIED FULLY WITH DUE PROCESS REQUIREMENTS ..... 21

A. The Christic Institute Waived An Evidentiary Hearing ..... 21

B. The District Court's Findings Were Sufficiently Specific ..... 21

IX. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING BAD-FAITH SANCTIONS ON PLAINTIFFS AVIRGAN AND HONEY ..... 21

CONCLUSION ..... 25

## TABLE OF AUTHORITIES

*CASES* Page

*Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) ..... 5, 7, 9
*Avirgan v. Hull*, 691 F. Supp. 1357 (S.D. Fla. 1988) ..... 15, 16
*Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989) ..... *passim*
*Avirgan v. Hull*, 125 F.R.D. 189 (S.D. Fla. 1989) .. 12, 23, 24
*Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991) .. 6
*Blue v. U.S. Dept. of Army*, 914 F.2d 525 (4th Cir. 1990) ..... 18, 20
*Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987) (*en banc*) ..... 15
*Celotex v. Catrett*, 477 U.S. 317 (1986) ..... 5, 7, 9
*Chambers v. NASCO*, 111 S. Ct. 2123 (1991) ..... 13, 19, 20, 21, 22
*Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990) ..... 6
*Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (*en banc*) ..... 11
*Glass v. Pfeffer*, 849 F.2d 1261 (10th Cir. 1988) ..... 19, 20
*In re Kuntsler*, 111 S. Ct. 1607 (1991) ..... 10
*In re TCI, Ltd.*, 769 F.2d 441 (7th Cir. 1985) ..... 15
*Media Duplication Services v. HDG Software*, 928 F.2d 1228 (1st Cir. 1991) ..... 10
*Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) ..... 12
*Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) ..... 16, 17, 18, 19
*Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) ..... 10, 22
*Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) ..... 7
*United States v. Nesglo, Inc.*, 744 F.2d 887 (1st Cir. 1984) ..... 11

*STATUTES AND RULES*

18 U.S.C. § 1964(c) ..... 7
28 U.S.C. § 1927 ..... 14, 15, 18, 19
Fed. R. Civ. P. 11 ..... *passim*
Fed. Local Ct. Rules, S.D. Fla., Rule 10.B.1 ..... 10, 21

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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Nos. 91-617, 91-618, 91-619

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### RESPONSE TO PETITIONERS' STATEMENTS OF THE CASE

Respondents will not respond here in any length to the statements of the case contained in the petitions for writs of certiorari. We note that they are argumentative, inaccurate, and, for the most part, relevant only to the award of summary judgment—which is not

the subject of the certiorari petitions—and not to the award of sanctions. Additionally, petitioners' version of the facts was rejected by the Eleventh Circuit, which unanimously found that ample time and scope was granted to petitioners to obtain discovery in support of their allegations, and that the "evidence" produced by petitioners was insufficient to satisfy their burden in defeating respondents' properly supported summary judgment motions.

With respect to the facts material to the sanctions awards, petitioners fail to mention many of the key facts relied upon by the district court. In particular, petitioners fail to discuss the district court's findings regarding the false and misleading nature of the Sheehan Affidavit (R4.141), which contained a detailed exposition of the "knowledge" of petitioners at the time they filed their complaint (2SR2.1300, p. 7 of Sanctions Affidavit), and which was the basis for the two years of litigation that preceded the summary judgment awards. *Avirgan v. Hull*, 705 F. Supp. 1544, 1545 (S.D. Fla. 1989) (J. App. I, 32-A - 33-A). The Sheehan Affidavit, submitted in December 1987 to defeat a motion to dismiss, outlined the purported testimony of 79 alleged witnesses in support of the allegations of the Second Amended Complaint. Petitioners vigorously resisted disclosing the identity of those alleged witnesses, citing concerns for their security. When disclosure was finally completed, after a twelve-month procedural battle, it was learned that 11 of the 79 sources simply did not exist, 17 were dead or of unknown identity to petitioners, two were later admitted by petitioners to have provided no information set forth in the affidavit, and 10 denied having given petitioners the information attributed to them in the Sheehan Affidavit.[1] As the district court found,

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[1] (R4.141; R14.529; R15.556; R16.595 Ex. C; R17.646; R40E.1193.706, 712; R16.595 Ex. D-1, ¶ 10, D-7, D-11; R42E.1197.295-305; R18.656 Exs. 2, 4; R38.1218 Ex. F; R38.1218 Ex. G.)

> [t]he names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statement that would be admissible.

705 F. Supp. at 1545.

The petitioners' statements of facts suffer not only from omissions of fact, but misstatements of the record. For example, Petitioner Sheehan refers to an indictment by the Costa Rican government as part of his "compelling pre-filing evidence." (Sheehan Pet. 7.) However, the alleged Costa Rican "indictment" was *not* part of the "pre-filing evidence," is not even part of the record in this case, and was rejected for filing by the Eleventh Circuit when petitioners sought to supplement the record with it. Likewise, nothing in the record supports Petitioner Sheehan's representation that he informed the district court of 49 exhibits and 58 witnesses on causation in the plaintiffs' pretrial stipulation. (Sheehan Pet. 11.) That document merely listed the names of over 2000 witnesses and thousands of exhibits with no indication of their relevance. (R.28.972.)

Other misstatements of fact and incomplete or misleading statements of the record in petitioners' briefs are discussed below in the contexts of the various arguments to which they are relevant.

## SUMMARY OF ARGUMENT

The three petitions to which this joint consolidated opposition responds arise from unusual circumstances where a district court, having determined that the petitioners had concocted a lawsuit and kept it alive by direct misrepresentations to that court, imposed substantial sanctions because of the great harm and expense caused by the litigation. Those sanctions were unanimously affirmed by a panel of the Eleventh Circuit, and no judge of that court requested that the court be polled on the suggestion for rehearing *en banc*.

Petitioners now claim constitutional violations, a conflict among the circuits, and a conflict with recent opinions of this Court to justify the grant of certiorari. None exist. The sanctions were well supported by the deceptive conduct of the petitioners below and were entered after a more than adequate opportunity for petitioners to be heard. No conflict exists between the two circuit court decisions cited by petitioner Christic Institute. No conflict exists with decisions of this Court. The specific and unique facts of this case fully justified the sanctioning of the Christic Institute "law firm," its lead counsel Daniel Sheehan, and the plaintiffs Avirgan and Honey.

Reduced to their essence, the petitions ask this Court to engage in a detailed factual analysis and find an abuse of discretion by the district judge. Such a review would be directly contrary to this Court's recent holding that deference should be paid to the findings of the district judge who is familiar with the issues and the litigants and in the best position to determine whether and what sanctions should be imposed. Moreover, because of the peculiar nature of the facts giving rise to these sanctions, review by this Court would not establish a rule of law with significance beyond the parties to this litigation.

No factual, constitutional, or policy reason exists to grant the petitions for writs of certiorari to the Eleventh Circuit. The expense and disruption inflicted by these petitioners on the respondents should be brought to an end.

## REASONS FOR DENYING THE WRITS

### I. THE IMPOSITION OF RULE 11 SANCTIONS ON MR. SHEEHAN FOR FILING A GROUNDLESS SUIT AND FOR HIS MISREPRESENTATIONS IN SIGNED COURT PAPERS WAS WELL WITHIN THE DISTRICT COURT'S DISCRETION

Petitioner Sheehan argues in Point I of his petition that the district court violated his Fifth and Sixth Amendment rights not to be deprived of his property without due process of law when it imposed on him over $1,000,000 in Rule 11 sanctions. His tortured argument, even in its constitutional dressing,[2] asks only that this Court make a third review of the lengthy trial court proceedings and reverse the holdings of the district court and court of appeals that neither the complaint nor the Sheehan Affidavit was well grounded in fact at the time Mr. Sheehan signed them. Furthermore, Petitioner Sheehan misstates the basis on which the district court imposed Rule 11 sanctions, misapplies the *Celotex* and *Liberty Lobby* opinions, and misrepresents the facts in this case.

#### A. The Rule 11 Sanctions Imposed On Mr. Sheehan Were Based On Not Only Lack of Evidence But Also Misrepresentations To The District Court In And Involving His Affidavit

The district court imposed Rule 11 sanctions on Mr. Sheehan not only because he had "no evidence" to support his claim, as he suggests (Sheehan Pet. 20), but also because of his misrepresentations to the district court in and involving his affidavit. The district court found (1) that the Sheehan Affidavit outlined the purported testimony of 79 witnesses identified only by number, (2) that Mr. Sheehan had refused to disclose the identity of

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[2] Petitioner Sheehan claims violations of the Fifth and Sixth Amendments. However, the only arguable application of the Fifth Amendment is treated elsewhere in his petition—in his claims of denial of due process. The Sixth Amendment has never been held to have applicability to civil proceedings imposing Ruling 11 sanctions such as are involved here.

most of those witnesses for almost a year, citing concerns regarding the "security" of the witnesses, (3) that the reason for his refusal became apparent when final disclosure revealed that many of the so-called witnesses were totally unknown to Mr. Sheehan, had never spoken to him, or denied the information attributed to them, (4) that the Sheehan Affidavit had been the basis on which plaintiffs had been permitted to conduct two years of discovery, and (5) that Mr. Sheehan's refusal to disclose the identities of the witnesses prevented respondents from deposing the witnesses and delayed orderly discovery by defendants for many months. 705 F. Supp. at 1545 (J. App. I, 31-A). Thus, Petitioner Sheehan is clearly wrong in his contention that the Rule 11 sanctions were based only on the summary judgment findings that he had "no evidence" to support his claim. Indeed, elsewhere in his petition he recognizes this fact when he states: "petitioner's purported 'bad faith' was the basis of the entire sanction." (Sheehan Pet. 25.)

Based on this evidence of misrepresentation by Mr. Sheehan, the district court implicitly concluded, and the Eleventh Circuit agreed, that "Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit that the complaint was well-grounded in fact," and that he therefore violated Rule 11. *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991) (J. App. I, 21-A). For this Court now to sift through the voluminous record below, as requested by Mr. Sheehan, would eviscerate this Court's holding in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2459 (1990), which mandates deference to the district court on factual and legal findings in Rule 11 matters.[3]

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[3] *Cooter & Gell* held that a district court's imposition of Rule 11 sanctions is reviewable only for abuse of discretion. "Familiar with the issues and the litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply

### B. The District Court's Summary Judgment Order Is Not An Issue Before This Court And, In Any Case, Is Correct

Even though Mr. Sheehan devotes five pages of his petition to an analysis of whether summary judgment was properly granted, he has not asked this Court to grant certiorari on this issue.[4] His sole reason for analyzing the district court's summary judgment findings is to attempt to show that they were procedurally defective under this Court's decision in *Celotex* and *Liberty Lobby* and thus that the Rule 11 sanctions, which he claims were based on the summary judgment findings, were also defective. As shown above, the Rule 11 sanctions were based not only on the summary judgment findings of "no evidence" but also on Mr. Sheehan's misrepresentations to the district court throughout the course of the district court proceedings. Thus, Mr. Sheehan's summary judgment analysis is irrelevant. It is also wrong.

The district court did not grant summary judgment on mere conclusory assertions that petitioners had no evidence, as Mr. Sheehan contends. (Sheehan Pet. 20.) Respondents amply demonstrated that petitioners had no admissible evidence showing that respondents had caused the La Penca bombing—a key element of plaintiffs' RICO claim.[5] For example, Respondent Shackley's third mo-

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the fact-dependent legal standard mandated by Rule 11." 110 S. Ct. at 2459.

[4] None of the other petitioners seek review of that part of the Eleventh Circuit's decision affirming the award of summary judgment. Accordingly, the summary judgment award is final and not subject to further review.

[5] Petitioner Sheehan does not contest that plaintiffs were required to prove, as an essential element of their RICO claim, that their injuries were proximately caused by the alleged Neutrality Act enterprise. 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

tion for summary judgment was supported by the following documents:

> 1. A statement of material facts not in dispute, which was "deemed admitted" pursuant to Southern District of Florida Local Rule 10J because plaintiffs failed to file a statement in which those facts were controverted. (R16.595.)
>
> 2. Plaintiffs' response to Mr. Shackley's second production request in which plaintiffs stated that they had no documents relating to their allegations against Mr. Shackley. (R16.595, Ex. B.)
>
> 3. Plaintiffs' answers to Mr. Shackley's interrogatories, which likewise showed that plaintiffs had no evidence linking Mr. Shackley to the La Penca bombing. (R16.595, Ex. C.)
>
> 4. Eighteen affidavits from individuals whom plaintiffs had described as having knowledge to support the allegations against Mr. Shackley or individuals in a position to know of any involvement by Mr. Shackley in Contra-related activities.[6] The affidavits contained explicit denials of knowledge of Mr. Shackley's involvement in the activities that plaintiffs alleged. (R16.595, Ex. D.)

Respondent Owen's summary judgment papers provide another example of respondents' extensive showing that there was no genuine issue of material fact on the issue of causation. Mr. Owen submitted an affidavit in which he denied each allegation made in the complaint against him. In addition, his summary judgment papers exam-

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[6] These individuals were described in plaintiffs' interrogatories as "believed to have firsthand knowledge" that Mr. Shackley supplied arms to the Contras or received the proceeds of illegal sales (R16.595, Ex. C, Interr. 2), or to "have knowledge of facts" supporting the allegation that Mr. Shackley joined the "enterprise" in 1984 (*Id.*, Interr. 3), or were listed as primary sources in the Sheehan Affidavit (R4.141).

ined the evidence in the Sheehan Declaration of Counsel (R18.661), which plaintiffs admitted was the only evidence they had against him. That examination showed that the evidence in the declaration (a) failed to demonstrate that "Amac Galil" was the La Penca bomber or that "Galil," if he existed, was a member of the alleged enterprise, (b) was based upon information that was not admissible in a court of law, or (c) contained no allegations of wrongdoing, knowledge, or participation on the part of Mr. Owen. (R30.1012.) Other defendants submitted similarly extensive evidence showing that plaintiffs had no admissible evidence on the issue of causation. (*See, e.g.*, R27.936; R.31.1030.)

Thus, respondents' motions for summary judgment presented evidence that both negated the causation element and pointed out petitioners' failure to produce sufficient evidence to create a genuine issue of material fact as to causation. This shifted the burden to petitioners to establish with admissible evidence the existence of a genuine issue of material fact on causation. *Celotex v. Catrett*, 477 U.S. 317, 322, 327 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Petitioner Sheehan does not contend that petitioners produced admissible evidence on the issue of causation.

Because the entry of summary judgment was procedurally and substantively correct and because sanctions were not based on the summary judgment ruling, there is no foundation for Mr. Sheehan's convoluted argument that sanctions were defective because summary judgment was entered in violation of *Celotex*.

## II. THE ENTRY OF SANCTIONS AGAINST MR. SHEEHAN COMPLIED FULLY WITH DUE PROCESS REQUIREMENTS

Petitioner Sheehan asks this Court to grant certiorari because "[t]his Court has not heretofore addressed the question of how much process is due to a respondent on a sanctions motion. An authoritative pronouncement by

this Court of the contours of that due process is necessary." (Sheehan Pet. 21.) The fact that a given question has not been resolved by the Supreme Court, however, has never been a recognized basis for the grant of certiorari. Furthermore, Petitioner Sheehan cites no conflicts with decisions of this Court or conflicts among the courts of appeals on this issue.[7] Finally, this argument has no merit.

**A. Mr. Sheehan Waived An Evidentiary Hearing**

There was no reason for the district court to hold an evidentiary hearing. None of the sanctioned parties requested a hearing on defendants' sanctions motions, as required by Southern District of Florida Local Rule 10.B.1,[8] and any right to a hearing was thus waived.[9] *See*

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[7] In fact, this Court recently denied certiorari, in another case where a Christic Institute attorney was sanctioned, on the issue of whether due process requires a hearing before the imposition of sanctions. *In re Kuntsler*, 111 S. Ct. 1607 (1991).

[8] Local Rule 10.B.1 provides in relevant part:

> A party who desires oral argument or a hearing of any motion *shall* request it in writing by separate request accompanying the motion or opposing memorandum. The request shall set forth in detail the reasons why a hearing is desired and would be helpful to the Court and shall estimate the time required for argument.

Fed. Local Ct. Rules, S.D. Fla., Rule 10.B.1 (emphasis added).

[9] This Court's decision in *Roadway Express v. Piper*, 447 U.S. 752 (1980), is not to the contrary. The issue of a hearing was not before the Court in that case because the district court had held a hearing and heard argument before entry of sanctions. *Id.* Moreover, while courts have cited *Roadway* for the proposition that due process requires an opportunity to be heard, it has never been held to mandate an evidentiary hearing on sanctions motions. *See, e.g., Media Duplication Services v. HDG Software*, 928 F.2d 1228, 1238 (1st Cir. 1991) (holding that "Rule 11 does not require a full hearing in every case" while noting that *Roadway* requires an opportunity for a "hearing on the record").

*United States v. Nesglo, Inc.*, 744 F.2d 887, 890-91 (1st Cir. 1984) (where appellants failed to file an opposition to a sanctions motion and to request a hearing, their due process complaint was "entirely frivolous").

Moreover, all petitioners received notice of the possibility of sanctions and full opportunity to explain their conduct. The district court expressly warned the parties of the possibility of sanctions. Although the district court denied respondents' sanctions motions at that time, its October 5, 1987 order recited Rule 11 and warned petitioners that it might reconsider the motions:

> The Court, however, has the duty and, will not hesitate to impose such sanctions *if it becomes evident at some later point that such violations have occurred.* If the discovery process unveils sanctional [sic] abuses heretofore raised, the Court will reconsider those motions at that time.

(R.11.438) (emphasis supplied). In addition, respondents' motions for attorneys' fees and costs put all petitioners, including Mr. Sheehan, on notice of the amount and type of sanctions sought and of the legal and factual grounds for them. (*See, e.g.*, R37.1179; R38.1213.) Fair notice requires nothing more. *See, e.g., Donaldson v. Clark*, 819 F.2d 1551, 1559-60 (11th Cir. 1987) (*en banc*) (notice may be given by a party or the court orally or in written submissions).

The district court was more than solicitous in according petitioners an opportunity to be heard on respondents' motions for fees and costs. The district court several times (and twice *sua sponte*) extended the time for petitioners to file their oppositions to the motions for sanctions from July 25, 1988 through October 4, 1988. (R39.1267; 2SR1.1271; 2SR1.1272; 2SR1.1294.) The substantive opposition petitioners eventually filed was 40 pages long, with 12 pages devoted to a discussion of Rule 11, five pages to § 1927, and eight pages to the bad-faith exception to the American Rule. (2SR2.1300.) Thus, the

district court allowed petitioners, including Mr. Sheehan, more than ample opportunity to be heard on respondents' motions and made sure that they availed themselves of that opportunity.[10]

### B. The District Court's Sanctions Orders Specified The Sanctioned Conduct And Sanctioning Authority

Petitioner Sheehan complains that the district court's bad-faith sanctions award failed to delineate the "conduct being sanctioned, the factual findings regarding each act, or the application of a particular sanction authority to the sanctioned acts." (Sheehan Pet. 25.) This contention ignores the district court's findings, the facts, and the law. The bad-faith sanctions were based on the groundless complaint, second amended complaint, and the nearly contemporaneous Sheehan Affidavit. 705 F. Supp. at 1545 (J. App. I, 31-A - 33-A); 125 F.R.D. at 190 (J. App. I, 51-A). The district court found that the allegations in the complaints "were based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." 705 F. Supp. at 1545 (J. App. I, 33-A). It further found that Mr. Sheehan "must have known prior to suing that [he] had no competent evidence

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[10] Petitioner Sheehan contends that "the severity of the sanction and the subjective elements on which it was based rendered an oral hearing imperative." (Sheehan Pet. 23-24.) However, the fact that petitioners caused great harm to a large number of defendants should not give them additional procedural rights. Likewise, the bad-faith basis of the sanctions does not require a hearing. Chief Judge King, who presided over the entire course of the district court proceedings, based his bad-faith findings largely on Petitioner Sheehan's own conflicting representations to the court in his affidavit and proceedings related to it. Under these circumstances, an evidentiary hearing with cross-examination was unnecessary. *See Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) (holding a hearing is unnecessary when "the judge's participation in the proceedings provide[s] him with full knowledge of the relevant facts").

to substantiate the theories alleged in their complaint." 705 F. Supp. at 1545 (J. App. I, 32-A). The district court also found that the Sheehan Affidavit was the cause of lengthy and costly battles, including a petition for writ of mandamus to the Eleventh Circuit, for disclosure of unidentified sources many of whom were later admitted to be dead, nonexistent, unknown, or unlocatable. 705 F. Supp. at 1545 (J. App. I, 32-A); (R14.529; R15.556; R17.646). It was also the basis on which two years of costly and unproductive discovery proceeded until the grant of summary judgment. 705 F. Supp. at 1545 (J. App. I, 32-A). Further, Mr. Sheehan used his false affidavit to support many subsequent filings. (*See, e.g.*, R7.280.2; R9.378.3-5; R9.379.3; R14.520.2; R17.635.9, 11.)

Thus, all of Mr. Sheehan's conduct throughout the litigation was sanctionable and was so found by the district court, which sanctioned Mr. Sheehan "coextensively" under Rule 11, § 1927, and the bad-faith exception to the American Rule. 705 F. Supp. at 1549, n.5. Under this Court's recent decision in *Chambers v. NASCO*, 111 S. Ct. 2123 (1991), it was unnecessary for the district court to parse through various sanctioning authorities before imposing bad-faith sanctions pursuant to its inherent power:

> In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves.

*Id.* at 2136.

Finally, Petitioner Sheehan contends that the district court's bad-faith findings against him are flawed because they do not include a "finding of actual knowledge or scienter." (Sheehan Pet. 25.) This argument is raised for the first time in the petition for certiorari. Moreover,

the record below amply supports a conclusion that Mr. Sheehan knew that representations in and regarding his affidavit were false. As discussed above, for example, Mr. Sheehan resisted disclosing the identities of his 66 unidentified sources in his affidavit, in part, on the ground that he feared for their safety. (*See, e.g.*, R10.388.5; R16.595 Ex. C.) As the author of his affidavit, however, he must have known that many of those sources whom he so fiercely protected from identification were dead, nonexistent, unknown, or unlocatable. In light of these objective record facts, which were observed by the district court, 705 F. Supp. at 1545 (J. App. I, 32-A), a specific finding of "scienter" was unnecessary.

## III. THE DISTRICT COURT'S FINDINGS REGARDING THE IMPOSITION OF § 1927 SANCTIONS ON MR. SHEEHAN COMPLIED WITH DUE PROCESS REQUIREMENTS

Petitioner Sheehan asserts an additional due process argument in Point III of his petition regarding the imposition of § 1927 sanctions: that the district court's sanctions order "wholly fails to specify which 'excess' costs can be attributed to which alleged 'multiplication' of the proceedings." (Sheehan Pet. 27.) This claim has no merit.

The district court's sanctions orders specifically found that the "plaintiffs' attorneys" filed a suit "based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge" and that they "must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint." 705 F. Supp. at 1545 (J. App. I, 32-A, 33-A). Mr. Sheehan's resort to fabricated witnesses and testimony in his affidavit demonstrates the groundlessness of the complaint and second amended complaint, which were based on the evidence in his affidavit. The district court's order implicitly, though unmistakably, concluded that the entire course of proceedings—consisting largely of exten-

sive litigation over disclosure of witnesses [11] and massive, fruitless discovery until entry of summary judgment—was unjustified and should neither have been commenced nor pursued. All costs and fees incurred after the filing of the complaint were therefore "excess" and properly awarded under § 1927. *In re TCI, Ltd.*, 769 F.2d 441, 448 (7th Cir. 1985) (district court had authority under § 1927 "to award the fees incurred right from the beginning" of the case where the complaint was baseless); *cf. Braley v. Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1987) (*en banc*) (assessment for the entire costs of litigation on appeal is appropriate where the entire appeal is frivolous). There was no need for the district court to specify the excess costs attributable to any particular act, as Petitioner Sheehan contends, for the whole case was unwarranted from its inception.

## IV. THERE IS NO CONFLICT BETWEEN THE DISTRICT COURT'S SUMMARY JUDGMENT AND SANCTIONS ORDERS

The final ground asserted by Petitioner Sheehan for this Court granting him certiorari—that "it is impossible to reconcile" the summary judgment order with the sanctions orders (Sheehan Pet. 30) is meritless. The summary judgment order found that petitioners had no admissible evidence on the issue of causation.[12] 691 F. Supp. 1357

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[11] Petitioner Sheehan contends that § 1927 sanctions based on his resistance to disclosing the unidentified sources would be "clear error." (Sheehan Pet. 27, n.10.) However, the district court did not base its sanctions order on Mr. Sheehan's resistance to disclosure but on the fact that he litigated disclosure knowing that many of the unidentified sources were dead or nonexistent.

[12] Petitioner Sheehan's contention that the district court acknowledged that plaintiffs' "evidence 'may establish' certain critical 'issues of fact'" (Sheehan Pet. 30) is wrong. The district court stated that plaintiffs' showing "may establish issues of fact concerning" only certain enumerated evidence, all incidental in nature. 691 F. Supp. at 1375 (J. App. I, 24.36-A). The district court then

(S.D. Fla. 1988) (J. App. I, 24-A). The sanctions orders found the same. 705 F. Supp. at 1545 (J. App. I, 31-A, 33-A). The additional finding of the sanctions orders that the Sheehan Affidavit was false creates no conflict with the summary judgment order.

## V. THE IMPOSITION OF RULE 11 SANCTIONS ON THE CHRISTIC INSTITUTE—A REAL PARTY IN INTEREST IN THIS CASE—IS NOT CONTRARY TO THIS COURT'S DECISION IN *PAVELIC & LEFLORE*

The district court held, and a unanimous panel of the Eleventh Circuit agreed, that Rule 11 sanctions against the Christic Institute are warranted. This ruling is not in conflict with this Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). The mandatory sanction of Rule 11 extends to two categories: "the person who signed [the paper], a represented party, or both." Fed. R. Civ. P. 11. *Pavelic & LeFlore* considered only the first category and held that the law firm of the attorney who signed the sanctionable paper cannot be sanctioned as "the person who signed [the paper]." It did not consider, much less decide, whether a "law firm" that is in fact a represented party, as is the case here, may be sanctioned under Rule 11.

In a very literal sense, the Christic Institute (not plaintiffs) was always the real party in interest in this litigation, under the direction of its chief counsel, Mr. Sheehan. The Christic Institute's fund-raising material made this point clear. For example, the Christic Institute characterized Tony Avirgan as the "plaintiff in the Christic Institute lawsuit." (R37.1178 Ex. I.) Elsewhere, it announced:

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went on to hold that plaintiffs made no showing on facts necessary to establish causation: "[T]hey make no showing [that] Hansen was the defendant Galil or that Hansen or Galil were associated with the enterprise, or worked with the enterprise, or were paid by the enterprise, or any of the defendants." *Id.*

"Christic Institute Presents Jackson Browne and Band: A Benefit Concert for the La Penca Lawsuit, and the Christic Institute's Contragate Project." (2SR4.1348 Ex. C.) And Mr. Sheehan, in one of his many fund-raising speeches on behalf of the Christic Institute, stated: "Well, we were quite distressed by this and we felt that we should hurry up and find ourselves a client, since we are an organization that is tax exempt, a public interest organization like the American Civil Liberties Union or the NAACP. We are allowed to engage in fomenting litigating." (R37.1218 Ex. F at 27.)

Moreover, the Christic Institute paid plaintiffs Avirgan and Honey for the use of their names, as discussed below in Point IX. The plaintiffs recognized that this suit was indeed the product of the Christic Institute and indicated their "faith" in the truthfulness of the Christic Institute's allegations, many of which were unknown to them. (2SR4.1348 Ex. D.) In addition, the Christic "Institute's name appears on all or most of the plaintiffs' filings." 125 F.R.D. at 190 (J. App. I, 51-A). Further, responses to document requests and answers to interrogatories,[13] including answers that perpetuated the falsehoods of the Sheehan Affidavit, were executed by attorneys on behalf of the Christic Institute and served without any verification by the plaintiffs.[14] Finally, this litigation achieved its massive proportions as a direct and calculated result of the formidable fund-raising efforts of the Christic Institute. Under these circumstances, *Pavelic & LeFlore*'s

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[13] Fed. R. Civ. P. 33 provides that interrogatories are "to be answered by the *party* served . . . answers are to be signed by the person making them, and the objections signed by the attorney making them." (Emphasis added.)

[14] For example, in one early set of answers, the Christic Institute identified Colonel Barrantes as a person with knowledge but refused to identify source 38 of the Sheehan Affidavit because of its "good faith belief that such disclosure would put the health and safety of such person at great risk." (R16.595 Ex. C, pp. 4-9.) Subsequent, court-compelled disclosure showed source 38 to be the same Colonel Barrantes. (R14.529.)

ruling regarding the responsibility of a traditional law partnership is simply inapposite, and there is no conflict between that case and the holding here.

Even if the Eleventh Circuit erred in affirming Rule 11 sanctions against the Christic Institute after this Court's decision in *Pavelic & LeFlore*, certiorari is not warranted for two reasons. First, few, if any, cases will present situations where law firms have engaged in conduct such as that of the Christic Institute. Second, reversal on the Rule 11 sanctions would not change the result. The entire amount of the sanctions was imposed on the Christic Institute "coextensively" under Rule 11 and the district court's inherent powers to sanction bad-faith conduct. 705 F. Supp. at 1549, n. 5 (J. App. I, 42-A). As discussed below in Point VII, a unanimous panel of the Eleventh Circuit found that the district court did not abuse its discretion in imposing bad-faith sanctions on the Christic Institute. The sanctions, therefore, are supportable on an independent ground.

## VI. THE DISTRICT COURT'S IMPOSITION OF § 1927 SANCTIONS UPON THE CHRISTIC INSTITUTE DOES NOT MERIT REVIEW BY THIS COURT

Respondents do not maintain that the Christic Institute may be sanctioned under 28 U.S.C. § 1927.

Nevertheless, the district court's entry of § 1927 sanctions against the Institute does not warrant the exercise of this Court's review for several reasons. First, the plain language of § 1927 creates no ambiguity requiring resolution by this Court. By its terms, § 1927 applies only to attorneys. Sanctioning of a non-attorney under § 1927 is thus not likely to be repeated. Second, contrary to Petitioner Christic's contention (Christic Pet. 9), there is no conflict on this issue between the Fourth and Tenth Circuits. *Blue v. U.S. Dept. of Army* considered the issue of § 1927 sanctions against law firms only in dicta. 914

F.2d 525, 549 (4th Cir. 1990). *Glass v. Pfeffer* did not even involve § 1927, but rather the district court's inherent power to sanction bad-faith conduct. 849 F.2d 1261 (10th Cir. 1988). Third, reversal of the imposition of § 1927 sanctions against the Christic Institute would not change the result in this case. As explained above, the entire amount of the sanctions was also imposed under Rule 11 and the bad-faith exception, each of which independently supports the sanctions against the Christic Institute.

## VII. THE DISTRICT COURT'S IMPOSITION OF BAD-FAITH SANCTIONS ON THE CHRISTIC INSTITUTE IS NOT CONTRARY TO *PAVELIC & LEFLORE*

Petitioner Christic contends that the bad-faith sanctions imposed upon it pursuant to the district court's inherent power are contrary to this Court's decision in *Pavelic & LeFlore* and reflect a conflict among the circuits. (Christic Pet. 9, 11-14.) This contention is meritless.

*Pavelic & LeFlore* did not address, much less determine, the scope of a district court's inherent power to sanction bad-faith conduct. Rather, *Pavelic & LeFlore* considered only the scope of Rule 11 sanctions. Its ruling that a law firm is not subject to Rule 11 sanctions is based on a textual interpretation of a written rule that sets forth with "extreme care" the persons who must be sanctioned for violation of Rule 11. 110 S. Ct. at 459. *Pavelic & LeFlore*'s textual interpretation of Rule 11 cannot be read to circumscribe a district court's exercise of its inherent power to sanction the bad-faith conduct of those who appear before it—whether they be litigants, attorneys or law firms. This Court's subsequent decision in *Chambers v. NASCO* supports this view. 111 S. Ct. 2123 (1991). *Chambers* recognized the fundamental difference between sanctions imposed under statutes and rules and those imposed under a district court's inherent power.

> We discern no basis for holding that the sanctioning scheme of the statute and the rules displace the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigating abuses. At the very least, the inherent power must continue to exist to fill in the interstices. Even the dissent so concedes.

111 S. Ct. at 2134.

The Eleventh Circuit's affirmance of bad-faith sanctions against the Christic Institute—even if viewed only as the law firm of plaintiffs' counsel rather than a real party in interest—is in accord with a Tenth Circuit decision upholding bad-faith sanctions against a law firm. *See Glass v. Pfeffer*, 849 F.2d 1261 (10th Cir. 1988). Petitioner Christic relies on the Fourth Circuit's decision in *Blue v. U.S. Dept. of Army*, 914 F.2d 525 (4th Cir. 1990), to suggest that there is a conflict in the circuits on this issue. (Christic Pet. 9.) However, the Fourth Circuit in *Blue* specifically declined to determine whether a law firm is subject to sanction under the district court's inherent power:

> Because there is no basis in this record upon which to sanction the law firm, we need not address the question whether a law firm can ever be sanctioned under the theories [including inherent power] invoked by the district court.

914 F.2d at 549. The Fourth Circuit's failure to decide when a law firm may be sanctioned is no ground for concluding that there is a split in the circuits.

## VIII. THE ENTRY OF SANCTIONS AGAINST THE CHRISTIC INSTITUTE COMPLIED FULLY WITH DUE PROCESS REQUIREMENTS

The Christic Institute argues in Point III of its petition that "[t]he district court's failure to hold a hearing of any sort prior to assessing a huge punitive sanction and the panel's affirmance thereof is error of constitutional moment." (Christic Pet. 17.) That argument is meritless.

### A. The Christic Institute Waived An Evidentiary Hearing

The Christic Institute waived any right it had to an evidentiary hearing when, like Mr. Sheehan, it failed to request a hearing as required by Local Rule 10.B.1. *See*, Point II, *supra*. Furthermore, as noted above, the Christic Institute received a fully adequate opportunity to make written submissions on the sanctions issue.

### B. The District Court's Findings Were Sufficiently Specific

The district court's findings were sufficiently specific to comport with this Court's ruling in *Chambers*. As discussed above in Point V, the Christic Institute was a law firm in search of a plaintiff. Its goals were not the judicial resolution of a valid claim but rather exploitation of the subpoena power of the federal courts to conduct its own Iran/Contra investigation and to enhance its revenue-raising capabilities.[15] Against this backdrop, the district court found that the Christic Institute was so eager to launch its own Iran/Contra investigation that, in the name of its paid plaintiffs, it brought this suit based only upon "unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." 705

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[15] Petitioners described their lawsuit as the "legal equivalent of a federal criminal grand jury investigation." (R6.263.4 n.1 and attachment.)

F. Supp. at 1545 (J. App. I, 33-A). Accordingly, the district court found that the Christic Institute's attorneys "must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint." *Id.* at 1545 (J. App. I, 32-A). As the district court further found, the Christic Institute's conduct constituted an "abuse of the judicial process." *Id.* at 1545 (J. App. I, 33-A).

## IX. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING BAD-FAITH SANCTIONS ON PLAINTIFFS AVIRGAN AND HONEY

Petitioners Avirgan and Honey have presented no reason for this Court to review the district court's imposition of bad-faith sanctions on them. The district court's decision is not at odds with any decision of this Court. To the contrary, this Court's recent decision in *Chambers* upheld bad-faith sanctions in the entire amount of the defendant's attorney's fees—almost $1 million—against a non-lawyer plaintiff such as Avirgan and Honey. 111 S. Ct. 2123.[16] Likewise, Petitioners Avirgan and Honey have not suggested, much less demonstrated, any conflict in the circuit courts on the issue of whether lay clients are subject to bad-faith sanctions. Like the Sheehan and Christic petitions, the petition of Avirgan and Honey merely asks this Court to engage in a fact-specific determination of whether the district court abused its discretion in imposing bad-faith sanctions against them.

In any case, review of the sanctions orders and the record below demonstrates that the district court did not abuse its discretion in sanctioning Mr. Avirgan and Ms. Honey. This is not the typical case where the client pays

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[16] *Chambers* followed prior decisions of this court upholding bad-faith sanctions against litigants. *See, e.g., Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980) (reasoning that attorneys are subject to bad-faith sanctions precisely because litigants are).

for litigation or even receives free services. Rather, as found by the district court, these plaintiffs were paid by the Christic Institute "approximately $50,000 for consultation, public speaking, and trips from Costa Rica to the United States." 125 F.R.D. at 190 (J. App. I, 51-A).

Nor is this the typical case of a client merely relying on its attorneys and passively waiting for a result. Avirgan and Honey are as responsible as Sheehan and the Christic Institute for filing a baseless complaint. By the time the complaint was filed, Avirgan and Honey had conducted an investigation and written a report on the La Penca bombing. (Avirgan & Honey Pet. 3.) That investigation produced no witnesses who could show that any of the defendants were responsible for the La Penca bombing.[17] The failure of their own investigation to produce even one such witness should have alerted plaintiffs to the baselessness of the allegations of Sheehan and the Christic Institute when the latter recruited them to be plaintiffs.[18] As the district court found, "plaintiffs 'had every reason to know they stood no chance of proving' that the defendants were responsible for the injuries to Tony Avirgan." 705 F. Supp. at 1545 (J. App. I, 33-A).

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[17] The district court specifically found that "[a]fter two years of protracted and extensive discovery of scores of witnesses across the United States, Costa Rica, and elsewhere, the plaintiffs were unable to produce a single witness who could state that the defendants exploded the bomb or were responsible for the assassination attempt." 705 F. Supp. at 1545 (J. App. I, 31-A). *A fortiori*, they had no such evidence when they concluded their investigation or when they filed their complaint.

[18] The outcome of John Hull's criminal libel suit against Petitioners Avirgan and Honey has no bearing on the sanctions issue here. Even the garbled and uncertified translation that petitioners submitted to the district court (R3.103) shows that the Costa Rican judgment in no way validated the Avirgan-Honey investigation so that Avirgan or Honey could rely on its conclusions. All the court held was that Avirgan and Honey lacked the necessary intent to injure required to sustain the criminal charges. *Id.*

Moreover, the complaint to which Petitioners Avirgan and Honey sold their names went far beyond anything related to their investigation of the La Penca bombing. The complaint alleged a thirty-year conspiracy spanning four continents. Mr. Avirgan and Ms. Honey admitted at their depositions that they had no knowledge of any basis for the allegations in the complaint against many respondents, such as Shackley and Singlaub. (*See, e.g.*, R45.1202.98; R45.1202.112; R45.1202.288-90; R45.1202.93-94.) Such reckless disregard for the factual basis of a complaint filed in their names constitutes bad faith. Avirgan and Honey were witting and compensated participants in a groundless lawsuit that cost the respondents large sums of money, a significant amount of time that can never be recovered, and a great deal of anguish. They cannot avoid the consequences of their recklessness by hiding behind their attorneys.

Likewise, the continued participation of Petitioners Avirgan and Honey in this case constituted bad faith. Their contention that the case "proceeded with little or no involvement of the plaintiffs" except attendance at their own depositions and answering interrogatories (Avirgan & Honey Pet. 4) is belied by the facts. First, Petitioners Avirgan and Honey continued their investigation long after they wrote their report and met Mr. Sheehan. (*Id.* at 9.) Their own continued failure to unearth any competent evidence that the respondents caused the La Penca bombing should have alerted them to the groundlessness of the suit. Second, they met frequently with Christic Institute attorneys in the United States and Costa Rica and engaged in fund-raising for the litigation, activities for which they were compensated by the Institute. 125 F.R.D. at 190 (J. App. I, 51-A). Their continued assistance gave knowing support to Mr. Sheehan's conduct, which the lower courts found clearly sanctionable.

As the foregoing demonstrates, the district court's imposition of bad-faith sanctions against Petitioners Avirgan and Honey does not conflict with any decision of this Court, creates no conflict among the courts of appeals, and does not constitute an abuse of discretion.

## CONCLUSION

For the foregoing reasons, the petitions of Mr. Sheehan, the Christic Institute, and plaintiffs Avirgan and Honey for writs of certiorari should each be denied.

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MOTION FILED
DEC 16 1991

Nos. 91-617, 91-618, 91-619

*In The*
# *Supreme Court of the United States*
October Term, 1991

Tony AVIRGAN, Martha HONEY, Daniel P. SHEEHAN, and THE CHRISTIC INSTITUTE,
*Petitioners,*

versus

John HULL, *et al.*,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

## MOTION FOR LEAVE TO FILE and BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONS

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONS

Trial Lawyers for Public Justice, P.C., moves this Court for leave to file the attached brief *amicus curiae* supporting the petitions for certiorari on the issue of sanctions. Petitioners have consented to this motion. Respondent Singlaub, through his counsel of record, has opposed it.

## INTEREST OF THE *AMICUS*

Trial Lawyers for Public Justice is a national public interest law firm dedicated to using the skills and approaches of plaintiffs' trial lawyers to advance the public good. Supported by and operating through a nationwide network of nearly 1000 of the country's outstanding trial lawyers, TLPJ pursues precedent-setting and socially significant litigation in both the federal and state courts. Through such litigation, it seeks to advance consumer and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, and the protection of the poor and the powerless.

TLPJ has three reasons for being particularly interested in the sanctions issue in this case. First, to an extremely limited extent, TLPJ was directly involved in some of the proceedings below. Over four years ago, in October 1987, TLPJ and forty-five of its cooperating attorneys sought leave to enter appearances below for the limited purpose of taking depositions on plaintiffs' behalf.

The district court denied the motion, stating that attorneys could take depositions for the parties without entering their appearances in the case. Several TLPJ cooperating attorneys then proceeded to take depositions. Neither their conduct nor TLPJ's is in any way related to the entry of sanctions, but, as a direct result of our limited involvement below, we are convinced that plaintiffs' pre-filing investigation was extraordinary and that the case was filed and pursued in good faith.

Second, TLPJ is gravely concerned about the effect that the massive sanctions imposed in this case will have on the ability of all potential plaintiffs to pursue justice in the federal courts. The trial lawyers who perform and support TLPJ's work participate daily in virtually every type of litigation conducted in the federal courts: personal injury, commercial, civil rights, products liability, consumer, RICO, antitrust and securities class actions, etc. If the sanctions entered here are appropriate, then the entire plaintiffs' trial bar is at risk, as is the ability of all victims of tortious and criminal conduct to obtain adequate representation.

Third, as a public interest law firm, TLPJ is especially aware of and disturbed by the deleterious impact that the huge sanctions award issued in this case will have on the practice of public interest law. The courts below imposed over $1 million in sanctions jointly and severally against the individual attorney, the public interest law firm by which he is employed, and the individual clients without differentiating between the legal standards applicable to and the conduct of each. An award of this magnitude with no clear enunciation of the legal duties of the lawyer, the firm, and the clients seriously chills the practice of public interest law and the willingness of potential public interest clients to participate in litigation.

## REASONS FOR GRANTING THE MOTION

TLPJ seeks leave to file the attached brief *amicus curiae* because of its concerns about the grave threat that the sanctions entered below poses to the general practice of law and the future of public interest litigation in the federal courts. The brief stresses two reasons for granting certiorari.

First, given the extraordinary pre-filing investigation in this case and the reasons provided by the courts below for imposing sanctions, the entry of sanctions here constitutes a danger to all who litigate in the federal courts. Plaintiffs' pre-filing investigation and demonstration of facts in this case went far beyond what most plaintiffs or their lawyers do or are capable of doing. If they can be sanctioned here on the ground that the case should never have been filed, no lawyer, no law firm, and no client is safe.

Second, the utter failure of the courts below to differentiate between the conduct of and legal standards applicable to the attorney, the public interest law firm for which he works, and the clients will seriously impact the future of public interest litigation. If sanctions of this magnitude are going to be considered, much less awarded, then the respective legal duties of the lawyers, the law firm, and the clients have to be absolutely clear. Otherwise, public interest litigation -- in which the clients are usually motivated by matters other than their interest in receiving monetary compensation -- is likely to be significantly deterred.

WHEREFORE, TLPJ respectfully urges this Court to grant its motion for leave to file the attached brief *amicus curiae*.

December 16, 1991 Respectfully submitted,

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## BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONS

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## TABLE OF CONTENTS

INTEREST OF THE *AMICUS* . . . . . 1

STATEMENT OF THE CASE . . . . . 1

REASONS FOR GRANTING THE WRIT . . . . . 1

CONCLUSION . . . . . 6

## TABLE OF AUTHORITIES

CASES

*Browning Debenture Holders' Committee v. Dasa Corporation*, 560 F. 2d 1078 (2d Cir. 1977) . . . . . 3

*Collins v. Walden*, 784 F.2d 402 (11th Cir. 1986) . . . . . 2

*Collins v. Walden*, 834 F.2d 961 (11th Cir. 1987) . . . . . 2

*Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) . . . . . 3

*Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986) . . . . . 4

*Rothenberg v. Security Management Co. Inc.*, 736 F.2d 1470 (llth Cir. 1984) . . . . . 3

# BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

## INTEREST OF THE *AMICUS*

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

## STATEMENT OF THE CASE

We hereby adopt and incorporate by reference the Statement of the Case contained in the Petition for Writ of Certiorari of the Christic Institute.

## REASONS FOR GRANTING THE WRIT

We write separately to stress two grounds for granting the writ:

1. Given the facts of this case, the entry of sanctions constitutes a danger to all who litigate in the federal courts. There are three reasons this is so:

a. While the courts below did not mention it at all, plaintiffs' pre-filing investigation and demonstration of the facts underlying their allegations were extraordinary. The plaintiffs in this case, professional journalists, spent over a year interviewing scores of sources throughout the world in order to find out who was responsible for the La Penca bombing and their injuries. They then published an investigative report blaming many of the individuals later named as defendants, including John Hull. When Hull responded by filing criminal libel charges against them in Costa Rica, they went to court and won; the judge

specifically found that their conclusions were supported by "a serious and meticulous analysis of all the interviews, ... documents, tapings, and filmings" and could in no way "be considered as irresponsible." R3.103-App.I at 7.

It was only after this extensive investigation and the Costa Rican court's specific finding that their allegations were well supported that Avirgan and Honey filed the instant lawsuit. For the courts below to enter sanctions on the ground that the case should never have been filed is, therefore, incredible. Very few plaintiffs or their lawyers have ever done (or could ever do) more to investigate and demonstrate the validity of their allegations prior to filing suit.

The primary case cited by the courts below to support the imposition of sanctions, *Collins v. Walden*, 834 F.2d 961 (11th Cir. 1987) (*Collins* II), moreover, only underscores the propriety of plaintiffs' and their counsel's actions in this case. In *Collins* II, the plaintiffs had previously filed a lawsuit based on precisely the same facts and theories. During the course of the first suit, the district court had noted indications in the record that the plaintiffs' motive appeared to be harassment and explicitly told them that, if that was so, sanctions might ultimately be imposed. *Id.* at 963. After extensive discovery, the case was dismissed because, among other things, plaintiffs failed to produce or discover any evidence to support their allegations. *Id.* at 964. The Eleventh Circuit affirmed the dismissal, *Collins v. Walden*, 784 F.2d 402 (11th Cir. 1986)(*Collins* I), but despite the district court's warning, no sanctions were imposed.

Then, plaintiffs and their counsel filed a second suit essentially making the same allegations. This time, the district court imposed sanctions, in addition to dismissing the case. The Eleventh Circuit, quite understandably, affirmed. *Collins* II, *supra.*

The contrast between this case and *Collins* could hardly be more stark. Here, plaintiffs conducted an extensive investigation and, despite the absence of discovery, adduced sufficient evidence in support of their charges to actually win a libel case. Then, they instituted this lawsuit, fully intending to take the discovery to which they were, for the first time, entitled. If sanctions can be entered against them, then virtually all federal court litigators (who necessarily do far less pre-filing investigation) are at risk.

b. While some of the district court's factual assertions (quoted and relied upon by the appellate court) are, unfortunately, clearly erroneous, the primary factual grounds offered for the entry of sanctions below were that plaintiffs relied on hearsay in filing their case, that plaintiffs resisted defendants' discovery efforts, that some witnesses testified differently under oath than plaintiffs' counsel expected them to, and that, after two years of discovery, plaintiffs were unable to withstand defendants' motion for summary judgment. These things happen in litigation throughout the federal courts every day. They do not support a finding that plaintiffs or their counsel did anything wrong, much less that sanctions are appropriate.

In this respect, what the courts below did not do is at least as important as what they did do. At no time did they find that plaintiffs' claims were "entirely without color and ha[d] been asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Browning Debenture Holders' Committee v. Dasa Corporation,* 560 F. 2d 1078, 1088 (2d Cir. 1977) (defining standard for bad faith). Nor did they comply with the procedural safeguards that controlling precedent imposed in regard to a finding of bad faith or improper purpose. See *Donaldson v. Clark*, 819 F. 2d 1551 (11th Cir. 1987) (procedural requirements for Rule

11 sanctions); *Rothenberg v. Security Management Co. Inc.*, 736 F. 2d 1470 (llth Cir. 1984) (findings required for sanctions for bad faith). Instead, based on aspects of the case that were in no way unusual, the courts simply held that sanctions were appropriate. Such unrestrained judicial activism poses a severe threat to all who litigate in the federal courts.

c. While the courts below did not discuss the law applicable to sanctions in any detail, the primary legal ground they gave for the entry of sanctions is that plaintiffs and their counsel "must have known prior to suing that they had no competent evidence to [prove their case]." Even if plaintiffs and their counsel had known this prior to suing (we believe otherwise), that would not be a proper basis for the imposition of sanctions. Responsible attorneys routinely file cases without having competent evidence to prove their allegations; they reasonably believe that such evidence will be obtained through discovery. Neither they nor their clients should be subject to sanctions for following this entirely appropriate course of conduct.

To offer but one of what could be thousands of examples, in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986), two American television manufacturers sued 21 Japanese television manufacturers, charging that the defendants had conspired to drive American firms from the American television market. After several years of discovery far more voluminous than that taken below, summary judgment was entered in defendants' favor. The lower courts held, and this Court agreed, that plaintiffs had neither discovered nor produced any admissible evidence that raised a genuine issue of material fact as to the existence of the alleged conspiracy. Under the approach of the courts below in this case,

therefore, sanctions should have been entered against plaintiffs' counsel because they "must have known prior to suing that they had no competent evidence to prove their case." In fact, however, no sanctions were entered. Indeed, no sanctions were even discussed. That is how it should be. That is also why the sanctions entered here pose such a danger.

2. The sanctions rulings here pose an especially grave threat to those who practice or seek to participate in public interest litigation. This is so because the decisions below fail to draw any distinctions between the conduct of and legal duties applicable to the individual attorney, the public interest law firm that employs him, and the clients. The courts below consistently treat these different sanctioned parties as if they are interchangeable and as if improper conduct by one is automatically attributable to all -- at a price of over one million dollars.

As this Court knows, public interest litigation is generally conducted by dedicated and principled attorneys working for comparatively meager wages. The organizations that employ these lawyers are themselves usually underfunded and dependent upon financial contributions for their support. Public interest clients, moreover, are usually motivated more by concern for principle and the public good than they are by an interest in obtaining financial compensation. For all of these reasons, any threat of significant monetary sanctions is likely to be particularly chilling on those who participate in public interest litigation.

Given these considerations, it is especially important that, if monetary sanctions are to be considered, much less awarded, the legal standards applicable to the conduct of public interest lawyers, law firms, and clients, respectively, be absolutely clear. This case both demonstrates the need to

-- and gives the Court the opportunity -- to clarify those legal standards. If those standards remain unclear, particularly considering the enormity of the sanctions award in this case, the practice of public interest law will inevitably be chilled.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

December 16, 1991

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MOTION FILED
DEC 16 1991

Nos. 91-617, 91-618, 91-619

*In The*
# *Supreme Court of the United States*
October Term, 1991

Tony AVIRGAN, Martha HONEY, Daniel P. SHEEHAN, and THE CHRISTIC INSTITUTE,
*Petitioners,*

versus

John HULL, *et al.*,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF *AMICUS CURIAE* OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *et al.* IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *ET AL.* IN SUPPORT OF PETITIONERS

Respondent Singlaub, through his counsel of record, opposed the filing of the attached brief *amicus curiae*. Accordingly, *amici curiae*[1] (certain national religious organizations), by their undersigned attorney and pursuant to Rule 37 of the Rules of the Supreme Court, respectfully move this Court to grant permission to file the attached *amicus* brief. The brief is being submitted within the time allowed petitioners, whose position it supports.

These organizations request leave to file a brief *amicus curiae* in the matter of *Avirgan v. Hull* so that this Court may consider arguments for reversing the orders below assessing sanctions against plaintiffs' and their counsel. Each of the *amici*[2] herein has interests which may be affected by the decision of this matter, and those interests are distinct from the interests of the parties to this matter. Because the perspective and issues presented herein were not addressed in depth by the petitioners, *amici* believe that the Court and the interests of justice will be served by consideration of this brief *amicus curiae*.

*Amici* seek a resolution of the questions, "May injured

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[1]*Amici curiae* herein consist of the following organizations: National Council of Churches of Christ in the U.S.A., Church of the Brethren, Church Women United, Conference of Major Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious (Executive Committee), the Maryknoll Fathers and Brothers, and the General Conference Mennonite Church.

[2]The specific interests of the *amici curiae* are set forth in Appendix A.

persons seek the aid of the court to discover evidence as to the persons responsible for their injuries?" "Will the court lend its aid even if a preliminary inquiry discloses the possibility of involvement by high officials of the executive branch who may interpose claims of privilege?" The plaintiffs' claim for relief in this matter was not based upon any views that they may have had on United States foreign policy, but their rights under the law. The plaintiffs pursued their case under circumstances which included Executive branch officials lying to Congress about their activities in Central America, the shredding of documents, and the withholding of much relevant evidence by agencies of the Executive branch. Against such opposition, the plaintiffs' sole hope for legal compensation was to resort to an independent judiciary to compel the production of evidence for determination of their case by a jury.

The sanctions order entered in this case demonstrates that the effectiveness of a judicial remedy depends in large measure on the careful exercise by the courts of their power to compel the production of evidence. While investigations and the discovery of evidence might be categorized as the job of the public prosecutor, the wisdom of the checks and balances in the United States government can be seen in part in the ability of courts to order discovery without the aid, and even with the opposition of, the Executive. The disposition of the appeal in this matter tests whether the courts of the United States remain independent sources of such power that can be used as a safeguard against failures in the Legislative or Executive branch.

The *amici* have a strong interest in maintaining access to the courts for parties such as the plaintiffs in the underlying action. *Amici* also have an interest in access to the assistance of counsel, such as the Christic Institute who served as private attorneys general in the case below. In enacting the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 28 U.S.C. 1964, Congress

intended to encourage private attorneys general. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493, 105 S.Ct. 3275, 3283, 87 L.Ed.2d 346 (1985). The imposition of sanctions in this matter deters private parties from vindicating public interests, both because of the unreasonable standard for "competent evidence" prior to the filing of a complaint, and the staggering size of the award.

In sum, *amici* ask this Court to protect access to legal remedies where the Executive has failed to "take Care that the Laws be faithfully executed." U.S. Constitution, Art. II, § 3. This is a matter not only of private interest to the plaintiffs, but a matter of public interest in maintaining the integrity of the Constitutional scheme of government. History has demonstrated that no one branch can be trusted entirely to safeguard the liberty of the American people, and demonstrated as well the effectiveness of a Constitution which so divides the powers and responsibilities of governing that failures and abuses in one branch can be corrected by the vigorous exercise of the remedial powers of another.

## CONCLUSION

Because of the significance of this case to meaningful access to the Federal Courts, *amici* request leave to file a brief *amicus curiae* with the Court.

Respectfully submitted,

December 16, 1991

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## QUESTIONS PRESENTED

I. Did the district court and the panel err in requiring the petitioners' pre-filing inquiry to obtain the sufficiency of evidence which should be obtained through discovery?

II. Did the district court and the panel err in failing to consider Congressional intent to encourage private litigators to use discovery under the RICO statute as a safeguard against corruption?

III. Did the district court and the panel err in failing to consider the circumstances under which petitioners conducted their inquiries prior to filing the complaint?

IV. Does the district court decision create an appearance of improper consideration of the political implications of plaintiffs' case?

## TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iii

INTEREST OF THE AMICUS . . . . . 1

STATEMENT OF THE CASE . . . . . 2

SUMMARY OF THE ARGUMENT . . . . . 2

ARGUMENT . . . . . 4

I. The District Court and the Panel Erred in Requiring the Plaintiffs' Pre-filing Inquiry to Obtain the Sufficiency of Evidence Which Ordinarily Should Be Obtained Through Discovery . . . . . 4

II. The District Court and the Panel Erred in Failing to Consider Congressional Intent to Encourage Private Litigators to Use Discovery Under the RICO Statute as a Safeguard Against Corruption . . . . . 7

III. The District Court and the Panel Erred in Failing to Consider the Circumstances Under Which Plaintiffs and Their Counsel Conducted Their Inquiries Prior to Filing the Complaint . . . . 10

IV. The Courts' Decisions Create an Appearance of Improper Consideration of the Political Implications of Plaintiffs' Case . . . . . 14

## TABLE OF AUTHORITIES

CASES

*Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 107 S.Ct. 2759 (1987) . . . . . 13

*Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991) . . . . . *passim*

*Avirgan v. Hull*, 705 F.Supp. 1544 . . . . . 4

*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962) . . . . . 14, 15

*Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) . . . . . 5

*Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947) . . . . . 4

*Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336 (9th Cir. 1988) . . . . . 6

*Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, (D.C. Cir. 1984) . . . . . 13

*Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) . . . . . 7

*Talamini v. All-State Insurance Co.*, 470 U.S. 1067, 105 S.Ct. 1824, 85 L.Ed.2d 125 (1985) . . . . . 6

STATUTES AND RULES

18 U.S.C. 1964(c) . . . . . 7

84 Stat. 922-23 (1970) . . . . . 7

Fed. R. Civ. P. 11 . . . . . *passim*

Fed. R. Civ. P. 11 advisory committee note . . . . . 10, 11

Fed. R. Civ. P. 37 . . . . . 5

Fed. R. Civ. P. 45 . . . . . 5

OTHER AUTHORITY

American Judicature Society, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (1989) . . . . . 8

James A. Pike, John W. Willis, "The New Federal Deposition-Discovery Procedure," 38 Col.L.Rev. 1179 (1938) . . . . . 5

## INTEREST OF *AMICI CURIAE*

*Amici curiae* are religious organizations committed to working for a more just, equal and humane society through peaceful and democratic means. As strong advocates of social justice and government accountability, *amici curiae* believe that open access to the civil court system for litigants challenging ill-conceived or illegal governmental activity is central to the health and survival of the democratic system of government. The imposition of sanctions in this matter deters private parties from vindicating public interests, both because of the unreasonable pre-filing evidentiary standard propounded, and the staggering size of the award.

Anyone concerned for the robust operation of democracy cannot but be distressed to see the federal courts fail to exercise an independent role in supporting citizen action to apprehend wrong-doing by those in high places. In this instance two journalists (and a public-interest law firm), at great risk to themselves (as evidenced by their injury in the bombing of a press conference that is the very gravamen of their complaint), uncovered the edges of an elaborate illegal operation involving officials of the U.S. government and their confederates in gun-running and drug-trafficking. Their acumen has since been vindicated by the indictment and conviction of numerous participants in that cabal. But rather than being acclaimed and rewarded for their role as "private attorneys general" in unearthing this criminal activity, the plaintiffs in this case have been criticized by the courts for their temerity and saddled with an incredibly outrageous financial penalty! It defies belief that the defendants in this case, who responded to this suit with indignation and sought shelter behind various claims of privilege, but nevertheless were (subsequently) made to answer for their offenses, first intimated in this suit, are now to be rewarded by sanctions against those who first sought to call them to account. That is only the opposite of the way things ought to be, and the

Supreme Court now has a final opportunity to set them straight, so that the self-corrective processes of democracy will be reinvigorated rather than stifled by judicial action.

Because of the significance of this case to meaningful access to the federal judiciary by victims of governmental malfeasance, *amici* respectfully urge this Court to grant petitioners' applications for certiorari.

## STATEMENT OF THE CASE

The district court ruled and the panel affirmed a sanction in excess of $1 million against the petitioners Tony Avirgan and Martha Honey. That sanction was imposed jointly and severally against them and their lead counsel, petitioner Daniel Sheehan, and his public interest law firm and employer, petitioner Christic Institute. As used herein, the term plaintiffs shall mean only petitioners Avirgan and Honey; the term petitioners shall include plaintiffs, Sheehan and Christic. *Amici* adopt the statement of the case included in the brief of petitioners Tony Avirgan and Martha Honey.

## SUMMARY OF THE ARGUMENT

The sanctions order at issue here represents not a failure by plaintiffs or their counsel to fulfill obligations of litigants, but a failure of the district court to fulfill its responsibilities in the exercise of judicial authority. The plaintiffs' case called upon the judicial branch to protect the interests of private citizens who suffered real injury in the course of events that became the subject of an intense political debate. Plaintiffs could not turn to the Legislative or Executive branch to remedy that injury, as those coordinate branches were principally concerned with public policy, and in any event lacked the power to compensate for private injury. Their resort to the judicial branch has resulted, not in the production of evidence relevant to their case, but punishment

for raising a matter that caused controversy.

The political controversy that has been labelled "the Iran-Contra affair" increased the need for the courts to function as a truly independent branch of government, compelling the production of relevant evidence regardless of political consequences. In circumstances in which the Executive and Legislative branches' handling of the Iran-Contra affair has generated distrust and public skepticism, the action of the district court in punishing plaintiffs and their counsel for bringing this suit creates the impression that their punishment is based not upon an absence of evidence required by law, but upon the district court's resentment of the political controversy surrounding the case.

The sanctions order at issue here strikes at the integrity of the judicial process. This ruling imposes on plaintiffs, as a condition of admission to the court, that they must first obtain evidence normally gathered through the discovery process. Such a rule would destroy the effectiveness of civil litigation generally, and particularly its function as a safeguard against the failure of public prosecutors to bring to the courts cases involving violations of law by public officials or their political associates.

The attempt by the court below to shift its responsibilities to the plaintiffs is not only in conflict with the principle that private attorneys general are to be encouraged to use the courts to remedy legal wrongs, but also suggests that the judicial branch lacks the independence to uncover facts which may be embarrassing to political officials in the other branches.

This Court must send the strongest possible signal of disapproval to correct this misapplication of the law. It is vital that this Court set forth clear standards to prevent future abuses in the application of punitive provisions of procedural law.

## ARGUMENT

I. The District Court and the Panel Erred in Requiring the Plaintiffs' Pre-filing Inquiry to Obtain the Sufficiency of Evidence Which Ordinarily Should Be Obtained Through Discovery

The district court's order of February 2, 1989, affirmed by the Eleventh Circuit panel, *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), stated as a basis for the award of costs and fees its finding that:

> The attorneys for the plaintiffs, the Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint.

*Avirgan v. Hull*, 705 F. Supp. 1544, 1545 (S.D.Fla. 1989). This statement is apparently an interpretation of the standards of Rule 11, 28 U.S.C. 1927, or the "bad faith" exception to the American Rule, though it badly misstates those standards. By its use of the term "competent" to modify "evidence," the court has effectively replaced the "well grounded in fact" standard of Rule 11 with a hurdle that precious few complaints will clear. By requiring a plaintiffs' attorney to have "prior to suing" not only "knowledge, information and belief," but "competent evidence," the district court has held that a plaintiff must possess admissible evidence sufficient to prove their case prior to the filing of a complaint and discovery.

This evidentiary standard makes a mockery of court rules governing the discovery of evidence. Discovery is designed to employ the powers of the court as a device for ascertaining the facts prior to the time of trial. *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 389 (1947). The

provisions for subpoenas (Fed.R.Civ.P. 45) and compelled discovery (Fed.R.Civ.P. 37) make clear that the court is not to be a mere passive bystander, but that "if a plaintiff has a case he should be aided in fishing it out..." (emphasis in original) James A. Pike, John W. Willis, "The New Federal Deposition-Discovery Procedure," 38 Col.L.Rev. 1179, 1194 (1938). The reasoning of the district court and the panel are not only inconsistent with the basic philosophy of the rules governing discovery, but with the express guidance of the Eleventh Circuit; "The reasonable inquiry standard of Rule 11 does not preclude plaintiffs from establishing the merits of claims through discovery." *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987)(in banc).

Here, the district court expressed reluctance to fulfill its responsibilities to supervise discovery:

> You all have vastly more experience than I do with discovery problems. I don't deal with them and I haven't in a long time ... I may have to start saying, all right, you say you can't agree, you say this [is] a real serious legal issue and we will sit down and we will go through it. If I find it is not, then somebody is going to get taxed with costs and fees. I don't say to you that I am going to do that. I say to you the time may be coming because I can't keep on with all this discovery mess that you all are throwing at each other. So I caution you about that. [Transcript of Hearing before Judge King, *Avirgan v. Hull*, Case No. 86-1146, Oct. 28, 1987, p. 50-51.]

This is strong evidence that the district court has actually punished plaintiffs for seeking the aid of the court in discovering evidence. Regardless of how impatient a court may become with acrimonious proceedings, the court cannot impose upon a plaintiff the full responsibility for discovering evidence before initiating proceedings in which the court

shares responsibility for assisting in the discovery of evidence.

The district court's attempt to substitute a requirement of proving a case through a pre-filing inquiry, rather than through properly supervised discovery, has the effect of closing the doors of the courts. This violates fundamental values of the American justice system:

> Freedom of access of the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. . . . [T]he strong presumption is against the imposition of sanctions for invoking the processes of the law.

*Talamini v. All-State Insurance Co.*, 470 U.S. 1067, 105 S.Ct. 1824, 1827-1828, 85 L.Ed.2d 125 (1985) (Stevens, J., joined by Brennan, Marshall and Blackmun, concurring), quoted in *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988).

So long as this million-dollar sanctions order stands, it is a warning to injured parties that they should not turn to the courts to ferret out the truth, if those who injured them have had the assistance of powerful friends to aid in hiding evidence. Such a standard not only makes discovery irrelevant as a legal procedure, but effectively closes the doors of our courts to many persons who have suffered compensable harm.

II. The District Court and the Panel Erred in Failing to Consider Congressional Intent to Encourage Private Litigators to Use Discovery Under the RICO Statute as a Safeguard Against Corruption

The need for availability of the powers of the courts to discover evidence, while clearly strong in any civil litigation, is heightened in those situations where Congress has acted to encourage private attorneys general to bring suits to safeguard important public interests. In awarding sanctions, the court below failed to consider the importance of Congress' decision to encourage civil plaintiffs to use the power of the courts to discover and deter criminal enterprises. Like the attorney fee provisions of the Civil Rights statutes, these provisions were intended to encourage "private attorneys general" to bring suits to vindicate public interests. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493, 105 S.Ct. 3275, 3283, 87 L.Ed.2d 346 (1985).

Where, as here, the circumstances of the case suggest the potential of corruption or improper influence of government officials, the need for independent exercise of the judicial power to compel discovery is further increased. While the civil provisions of RICO, 18 U.S.C. 1964(c) "fill prosecutorial gaps," *Sedima, supra*, the legislative history of RICO demonstrates that the statute's remedial purposes also included safeguarding against the corruption of public prosecutors. In adopting the bill that included RICO, Congress expressly found that criminal enterprises were using their power "to subvert and corrupt our democratic processes." 84 Stat. 922-23 (1970).

The need for judicial deference to Congressional determinations of the public interest in the application of Rule 11 has been noted elsewhere:

> The existence of a pro-plaintiff fee-shifting statute designed to ensure the availability of a pool of competent counsel is an independent reason to use Rule 11 sparingly, in order to avoid both conflict with Congress' policy judgments and challenges to the Rule's validity. (citation omitted)

American Judicature Society, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, at 72 (1989).

Prior to its entering of sanctions, the district court had notice that several of the defendants in this matter had been indicted for offenses alleged in the civil complaint. Defendants Secord and Hakim were indicted by a Washington, DC grand jury on March 16, 1988 on charges that included allegations of conspiracy with certain government officials to commit crimes resembling the allegations in the plaintiffs' complaint here. Case No. CR-88-0080-GAG, March 16, 1989, United States District Court for the District of Columbia. Secord and Hakim moved the district court for a delay in this civil case because of the conflict with their criminal trial. Both were convicted after entering guilty pleas in November, 1989.

Two government officials who cooperated with the enterprise alleged in the underlying case have been convicted for those activities; Oliver North, in Case. No. CR-88-0080(GAG), United States District Court for the District of Columbia, judgment docketed July 13, 1989 - this conviction was reversed on appeal, *U.S. v. North*, 910 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990) when the court determined that testimony used against North at trial was tainted by testimony he gave to Congress three years earlier under a grant of immunity; and Robert MacFarlane in Case No. CR-88-0078(AER), United States District Court for the District of Columbia, judgment entered March 8, 1989. A

third government official was convicted on similar charges on April 7, 1990; John Poindexter, CR-88-0080-GAG, United States District Court for the District of Columbia (Poindexter's conviction was later overturned on the same grounds as North's conviction, *U.S. v. Poindexter*, 1991 WL 235749 (D.C. Cir. Nov. 15, 1991). Oliver North and John Poindexter were indicted together with defendants Secord and Hakim.

A fourth official, Joe Fernandez, was indicted on related charges, Case No. 89-150-A, United States District Court for the Northern District of Virginia. The Fernandez case was dismissed on November 24, 1989 after United States Attorney General Richard Thornburg blocked the disclosure of classified information. *U.S. v. Fernandez*, 913 F.2d 148 (4th Cir. 1990).[1]

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[1]The Independent Counsel, Lawrence Walsh, complained to Congress that "[t]he Administration's actions in *United States v. Fernandez* and in other Iran/Contra prosecutions underscore the need for objective standards to govern the release of classified information in criminal prosecutions...[there is] an appearance of conflict of interest [because] the agency refusing disclosure [the CIA] is itself a subject of investigation." Independent Counsel's Supplement to Previous Reports Regarding *United States v. Fernandez*, submitted to the Intelligence Committees and Judiciary Committees of both houses of Congress on October 24, 1990.

Since the opinion of the Eleventh Circuit panel upholding sanctions, three additional high-ranking executive branch officials have been indicted, and two convicted, for obstructing official investigations of the enterprise defined in plaintiffs' complaint: Claire George in Case No. CR-91-521-RCL, United States District Court for the District of Columbia; Elliot Abrams in Case No. CR-91-575, United States District Court for the District of Columbia, judgment entered October 7, 1991; Alan D. Fiers in Case No. ____, United States District Court for the District of Columbia, judgment entered on July 9, 1991.

The need for civil litigation as a check against corruption of government officials is no mere abstraction in the *Avirgan* case. The evidence of complicity by government officials in illegal activity is the strongest possible demonstration of the need for independent judicial consideration. The dangers of government corruption, and the Congressional determination of the importance of remedying them through civil litigation, should have led the district court to exercise the greatest receptiveness in evaluating the reasonableness of the plaintiffs' case at the time of filing, when it appeared much of the evidence was in the hands of government officials with an interest in hiding their roles. Instead, the district court took a cavalier attitude toward discovery, as noted above, and punished the plaintiffs for failing to assemble the sufficiency of evidence which should have been gathered through court-supervised discovery.

III. The District Court and the Panel Erred in Failing to Consider the Circumstances Under Which Plaintiffs and Their Counsel Conducted Their Inquiries Prior to Filing the Complaint

While the standards applied by the district court would be inappropriate under any circumstances, they are particularly egregious in the circumstances of this case. In awarding sanctions under Rule 11, courts have been cautioned to "avoid the wisdom of hindsight," Fed. R. Civ. P. 11 advisory committee note, and to judge the conduct of counsel under the particular circumstances of the case:

> Thus, what constitutes reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion, or other paper was based on a

> plausible view of the law; or whether he had depended on forwarding counsel or another member of the bar.

Fed. R. Civ. P. 11 advisory committee note. As the 1983 amendment to Rule 11 was based upon the inherent power of the court as exercised under the "bad faith" exception, a similar caution should guide the application of sanctions under the "bad faith" exception as well. Fed. R. Civ. P. 11, notes of advisory committee.

Absent subpoena power, attorneys cannot be held to know every fact, but rather the facts that would become known through a reasonable inquiry. Where circumstances make the discovery of evidence exceptionally difficult, the rules should be interpreted to permit the filing of a complaint. Discovery would then serve its intended purpose of obtaining the evidence that would either support the complaint or lead to its amendment to conform to the discovered evidence.

An obvious impediment to the investigation by the plaintiffs was the fact that the crimes which caused their injuries took place in foreign countries. Indeed, the bombing which took place in Nicaragua was the result of shipments of explosives from the United States into Costa Rica, while the evidence of travels by the bomber involved stops in many other countries. Thus, any responsible inquiry into the cause of the bombing required the plaintiffs and their counsel to obtain information from many different countries, much of it from uncooperative sources. Only in the United States were there centralized sources of information subject to discovery. This was the case because United States government agencies had played key roles in investigating the bombing and because many of the defendants were residents of the United States.

Most importantly, the district court was aware that the plaintiffs, their sources and their employees were threatened

with death for revealing information about the defendants' activities prior to the filing of the complaint. This argues strongly for affording plaintiffs the relative safety of the judicial process, rather than requiring them to endure such risks to gather evidence on their own prior to any filing.

Further appreciation for the barriers to plaintiffs' inquiry should have been obvious to the court from the withholding of evidence which began once the filing of the complaint made available subpoena power and compulsory discovery processes. Numerous claims of privilege by the defendants, by government agencies and by non-party witnesses prevented plaintiffs from discovering much evidence relevant to their case. The resolution of these claims called for the most exacting inquiry, but the district court proceeded to summary judgment and even a sanctions order without resolving many of these claims.

Other circumstances after the entry of summary judgment, but before the award of sanctions, should have demonstrated to the trial court that evidence could have been produced only through compulsory process, and not the plaintiffs' unaided efforts. On June 28, 1988, prior to the entry of the sanctions order, defendant Posey was indicted by a grand jury in the Southern District of Florida for violations of the Neutrality Act based on allegations similar to those in plaintiffs' complaint. Case No. 88-6097-CR-Roettger, United States District Court for the Southern District of Florida. Since the entry of the sanctions order, defendant John Hull fled Costa Rica following an indictment in that country for drug trafficking. Information of January 12, 1989, Poder Judicial, Republic of Costa Rica, No. Inf. 052-DV-89. Since fleeing, defendant Hull, along with defendant Felipe Vidal, were both indicted for murder for their role in the bombing of the press conference which injured plaintiff Avirgan. *See New York Times*, March 1, 1990, *Washington Post*, March 1, 1990, p. A1.

In a case which faced remarkably similar difficulties in

obtaining evidence, the United States Court of Appeals for the District of Columbia overturned a dismissal of a complaint, saying:

> [D]ismissal of a complaint is not proper "when information which might be relevant to a . . . claim is unavailable for discovery.". . . Speculation about Executive privilege in this case cannot justify squelching the plaintiffs' complaint prior to any factfinding.

*Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1513, (D.C. Cir. 1984). In the instant case, it could not reasonably have been predicted that government officials as well as individual defendants would successfully assert a wide range of privileges to block access to evidence of the particular facts which the court found determinative in its order of summary judgment. Surely if such circumstances would not justify dismissal of a complaint, they cannot justify sanctions against plaintiffs and their counsel.

Further, although this Court established a uniform statute of limitations for RICO actions subsequent to the filing of this action in May 1986, *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 107 S.Ct. 2759 (1987), at the time of filing it was not clear how much time remained for plaintiffs to assert their claim. Indeed, on appeal some defendants advanced the argument that the filing of this complaint was barred by the statute of limitations. (Joint Brief of Appellees Calero, Clines, Delamico, Hakim, Hull, Martin, McCoy, Owen, Quintero, Secord, Shackley and Singlaub, p. 72, fn. 45, Case No. 88-5720, United States Court of Appeals for the Eleventh Circuit.)

Viewing the circumstances as a whole at the time of the filing of this complaint, it cannot be said that plaintiffs or their counsel were acting in bad faith or had failed to conduct an inquiry which was reasonable under the

circumstances. Under very difficult circumstances the plaintiffs and their counsel obtained information amply justifying the filing of their complaint. To apply Rule 11 in a manner consistent with its intent as interpreted by the advisory committee notes, under the difficult circumstances in which the plaintiffs found themselves the district court should have required a lower quantum of evidence to be obtained prior to filing.

## IV. The Courts' Decisions Create an Appearance of Improper Consideration of the Political Implications of Plaintiffs' Case

Finally, defendants have repeatedly characterized this case as "political" in an attempt to confuse the court about the true nature of the dispute.[2] While the case clearly has political implications, the case does not center on "political questions" which cannot be resolved by the courts. See, *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962).

Plaintiffs' goal in this case was compensation for the injuries they suffered, a goal which could not be achieved through legislative inquiry or a criminal prosecution.

This Court must make clear beyond dispute that the political views of the plaintiffs or of those who attacked them are irrelevant to the resolution of this case. The award of sanctions in an order so lacking in references to legal standards but bristling with hostile characterizations of the

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[2] See, e.g.: "[t]he Federal Judiciary was not designed to provide a publicity forum for scandalous propaganda aimed at changing public opinion regarding the Nicaraguan Civil War." Defendant Posey's Motions for Dismissal and to Strike docketed June 19, 1986. The complaint is "a rambling discourse of political theatre." Defendant McCoy's Motion to Dismiss and Motion to Strike docketed July 30, 1986.

actions of plaintiffs' counsel creates the impression that the district court sought to punish the plaintiffs and their counsel for bringing a case fraught with political implications.

The judicial branch should not avoid cases that may cause political embarrassment to officials of another branch, but should take greater than ordinary care to demonstrate strict adherence to rules of procedure in order to maintain public confidence in the integrity of the courts. Cases touching on political questions require "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. Where parties have repeatedly sought to inject inappropriate political considerations into the decision of a case, and the proper resolution of the case has significant political implications, the "discriminating inquiry" of the court should have made clear that principles of law rather than politics governed its decision. The district court failed to exercise this level of care in its sanctions order. That order's failure to apply the standards of the law to the facts leaves the impression that the order was not based upon the authority of the cited law, but upon political animus toward plaintiffs and their counsel. To maintain public confidence in the integrity of the judicial system, the reversal of this sanctions order must be clear and emphatic.

The *Avirgan* case has served important public interests by provoking questioning about the nature and extent of military efforts directed against Nicaragua. Congressional and Executive branch inquiries have focused on violations of law by government officials rather than individuals, though defendants Secord, Hakim, Hull, and Posey have each been indicted for offenses included in those alleged by plaintiffs here. The public prosecutions have pursued theories of criminal liability different from the theories relied upon by plaintiffs in large measure because the public prosecutions have been blocked by claims of national security. The aspects of national security which are claimed to be threatened are essentially political in nature, as they concern

the foreign relations of the United States. It cannot escape judicial notice that these matters have been at the center of intense public debate regarding both the foreign relations of the United States and the conduct of those relations.

Public debate is the lifeblood of democracy. However embarrassing to some officials, the full, public consideration of the covert war against Nicaragua ultimately will be a healthy development for our political system.

The defendants repeatedly objected to any public discussion of the public policy implications of this case. These actions, coupled with the district court's failure to articulate reasons for its award, create the impression that the court has punished plaintiffs because their case created a political controversy. This impression is heightened by the staggering size of the award of fees, which, together with the court's criticism of plaintiffs and their counsel, has attracted negative publicity toward plaintiffs' counsel. The message sent by the court's award is not one of deterrence but destruction.

## CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant petitioners' applications for certiorari.

Respectfully submitted,

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## APPENDIX A

National Council of the Churches of Christ in the U.S.A.

The National Council of the Churches of Christ in the U.S.A. is a community of communions composed of 33 national religious bodies, Protestant and Eastern Orthodox, having an aggregate membership of more than 40 million adherents in the United States. It is governed by a board of some 260 members appointed by its member denominations in proportion to their size and support of the Council. The Council does not claim to speak for all of those adherents, but seeks to carry out the wishes of their representatives as expressed in the policies they adopt through the Governing Board.

Church of the Brethren

The Church of the Brethren is a Christian body, with some 150,000 members in the United States and historical and ecumenical ties to many churches throughout the world. The Brethren are known for peace and service ministries. As of October 1989, the Church of the Brethren General Board has eight mission personnel serving in Central America, including El Salvador and Nicaragua, and maintains a partnership with a Nicaraguan Protestant church called the Mision Cristiana de Nicaragua.

The Church of the Brethren General Board enters as an amicus into this case because we are convinced that the legal and moral issues are significant. In 1987, the Annual Conference of the Church of the Brethren in a resolution, "Quest for Order" affirmed "obedience to human law, including obedience to the law by government itself..." (emphasis added). The waging of war against Nicaragua has been found a violation of international law by the World Court, and was a violation of our domestic law as found in the United States Constitution.

Therefore, the Church of the Brethren has an interest in this litigation, not only because of its potential affect upon our own mission program in Central America, but for the integrity of the United States government as well.

Maryknoll Fathers and Brothers

The Maryknoll Fathers and Brothers is a missionary society of priests, brothers and lay associates which, during the times covered by the allegations in the underlying litigation had Churches, chapels, mission programs and sixty-one missioners in Central American countries. These Churches, chapels, mission programs and missioners were at risk of injury from the criminal acts described in the plaintiffs' complaint. Therefore, the Maryknoll Fathers and Brothers have an interest in discovering and deterring criminal activity based in the United States but directed against nations in Central America, and therefore, has an interest in the just resolution of the underlying case.

Church Women United

Church Women United is a national ecumenical movement that brings Protestant, Roman Catholic, Orthodox and other Christian women together into one community of prayer, advocacy and service, and relates to half a million women in the United States. Working for a just, caring society, we are particularly concerned about criminal enterprises that could threaten our programs of service or our sisters and brothers in other nations with whom we are working to build greater international understanding. We therefore are adamant in opposing any restrictions which limit investigations of criminal activity such as was alleged in the underlying complaint. The Christic Institute, through its investigation of criminal activity and its filing of a complaint, has set an example for other organizations and attorneys to

take up unpopular and risky cases. We call for the reversal of the order of sanctions, and further ask that the greatest possible leeway be granted by the courts to further the intent of Congress in adopting the Racketeer Influenced and Corrupt Organizations Act so that those who bring harm to American citizens here or abroad may be brought to justice.

Disciples of Christ, Peace Fellowship

The Disciples Peace Fellowship is a religious organization directly related to the Christian Church (Disciples of Christ). During the time covered by the allegations in the underlying litigation, our organization has encouraged and/or sponsored group visits to Central America, and the religious denomination to which we are affiliated has had mission programs and personnel in Central American countries. More importantly, our church has supported the activity and work of several religious groups in Central America whose pastors and laity are citizens of those counties. All of the above-mentioned activities, programs and persons were at risk of injury from the criminal acts described in the plaintiffs' complaint.

The Disciples Peace Fellowship is a religious organization whose members and supporters are based in congregations of the Christian Church (Disciples of Christ) throughout the United States. There are pastors and laity in these churches who seek to provide service and counsel to victims of drug abuse in the United States, some of whom may even be members of these churches. These efforts to help such persons, and to prevent others from falling victim to drugs, have been overburdened by the enormous increase in the availability of drugs in the United States. This organization therefore has an interest in discovering and deterring the smuggling of narcotics into the United States as alleged in the complaint in the underlying action.

General Conference Mennonite Church

As one of the denominational sponsors of the Mennonite Central Committee (MCC), Akron, Pennsylvania, the General Conference Mennonite Church contributes workers from among its members and significant financial resources to the work of MCC in Central America, much of which is in support of the national Mennonite churches there. The General Conference Mennonite Church is a fraternal church with the Central American Mennonite churches in the Mennonite World Conference.

As of the 1988-89 report of the Mennonite Yearbook, there are 212 Mennonite churches with 10,085 members in Central America. A total of 40 MCC workers were stationed in those countries. Mennonite periodicals have carried reports of worship services of the national Mennonite churches in Central America which have been entered and disrupted by armed soldiers, and whose members have been held at gunpoint and kidnapped. Young male members of these churches have been forcibly impressed into one armed group or another, despite the long-standing public statements that all of the Mennonite churches adhere to peacemaking theology and have sought official recognition as conscientious objector churches. Anabaptist/Mennonite convictions on the way of peace date back to 1525, during the Reformation in Europe. Nevertheless, in addition to the attacks upon, national Mennonite church members, MCC church and development workers have received repeated death threats and have several times been kidnapped.

In North America, the Mennonite churches sponsor 18 hospitals and 11 mental health centers. Almost all of these offer either hospital critical care or mental health residential rehabilitation programs for drug abuse patients. The resources of these institutions have been severely strained in recent years as funds had to be diverted from other medical

and mental health care needs in order to cope with the rapid and large increase in drug abuse care needs.

With these direct involvements in the Central American conflicts and in light of the Congressional testimony and later convictions of high-placed United States officials, the General Conference Mennonite Church has followed with intense interest the lawsuit initiated by the Christic Institute of Washington, DC on behalf of the plaintiffs.

(7) (7) (5)

Nos. 91-617, 91-618, 91-619

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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TONY AVIRGAN, *et al.*,
*Petitioners,*

v.

JOHN HULL, *et al.*,
*Respondents.*

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## RESPONDENTS' JOINT CONSOLIDATED SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS FOR LEAVE TO FILE AND RESPONSE TO BRIEFS *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE AND NATIONAL COUNCIL OF CHURCHES OF CHRIST, *et al.*

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| SUMMARY OF THE ARGUMENT | 1 |
| BACKGROUND OF THE CASE | 2 |
| ARGUMENT | 5 |
| I. THIS CASE RAISES NONE OF THE POLICY ISSUES ADDRESSED BY THE *AMICI* | 5 |
| II. THE EXTENT OF PETITIONERS' INVESTIGATION DOES NOT EXCUSE THEIR FAILURE TO HAVE A REASONABLE BASIS TO FILE SUIT | 6 |
| III. THE DISTRICT COURT APPLIED THE APPROPRIATE RULE 11 STANDARD | 8 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES

*CASES* Page

*Avirgan v. Hull*, 691 F. Supp. 1357 (S.D. Fla. 1988) ..... 3
*Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989) ..... 8
*Avirgan v. Hull*, 125 F.R.D. 189 (S.D. Fla. 1989) .. 5
*Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) ..... 7
*Kendrick v. Zanides*, 609 F. Supp. 1162 (N.D. Cal. 1985) ..... 8
*Miller v. Schweickart*, 413 F. Supp. 1059 (S.D.N.Y. 1976) ..... 8
*Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. (1986), *cert. denied*, 480 U.S. 918 (1987) ..... 6
*Roadway Express v. Piper*, 447 U.S. 752 (1980) .... 6
*Whittington v. Ohio River Co.*, 115 F.R.D. 201 (E.D. Ky. 1987) ..... 8

*RULES*

Fed. R. Civ. P. 11 ..... 7

*OTHER*

Judge Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985) ..... 8

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### SUMMARY OF THE ARGUMENT

This case raises none of the policy issues cited by the *amici.* Sanctions for filing a frivolous suit and maintaining it with a false affidavit of counsel do not retard the pursuit of justice by litigants or lawyers, whether private or public.

This litigation was not, as *amici* contend, a suit for personal or business injuries allegedly suffered by petitioners Avirgan and Honey. It was the Christic Institute's effort to conduct its own Iran/Contra investigation and inquiry into 30 years activity of the "Secret Team." In their rush to use the La Penca bombing as a vehicle for such an investigation, petitioners ignored the fact that they had only rumor and innuendo on which

to base allegations that the defendants were responsible for that bombing. This misconduct was compounded by the filing of the deceptive Sheehan affidavit in an effort to hide this deficiency.

The extent of petitioners prefiling investigation cannot excuse the absence of a basis to believe that causation could be proved. The district court properly sanctioned the petitioners for their misconduct in filing the suit and perpetuating it by the Sheehan Affidavit—misconduct that went far beyond the "every day" activities of lawyers in federal court.

## BACKGROUND OF THE CASE

Given the conflicting and inaccurate presentation of the nature of this case in the brief offered for filing by *Amicus* National Council of Churches ("Churches"), some further background of the litigation and its conduct is necessary. This case was *not* filed or pursued as a claim for injuries to the individual plaintiffs as Churches suggests.[1] Rather, Mr. Sheehan and the Christic Institute brought this case in order to use the subpoena power of the federal courts to conduct their own Iran/Contra investigation.

Mr. Sheehan made clear on several occasions that, prior to the La Penca bombing, he was an attorney with a cause searching for a way to commence litigation to investigate events in Central America.[2] He saw the

---

[1] Petitioners' damages were minimal, in any event. Tony Avirgan's alleged damages from the bombing amounted to an injured finger, lost income, and lost camera equipment, for which he was compensated by his employer's insurance carrier. The only damages his wife, Martha Honey, allegedly incurred from the bombing were lost income and loss of consortium.

[2] In a speech reprinted in D. Sheehan and D. Ortega, *Assault on Nicarauga*, Mr. Sheehan stated that he learned that military equipment

> was going to the farm of a millionaire rancher down in Costa Rica. This rancher is a man by the name of John Hull, who had become the major ally for the Contras there. Well, we were

La Penca bombing as providing access to the federal courts for this purpose. Mr. Sheehan and the Christic Institute relied on rumor and speculation to allege a connection between the La Penca bombing and arms shipments to Central America [3] and between the defendants and Colombian drug lords [4] so that they could plead a cause of action and provide themselves a case that would generate fund raising.

Petitioners' conduct of discovery further demonstrated that this suit was not filed to compensate plaintiffs for their alleged injuries. Petitioners conducted discovery in a desultory manner until March 1988, when the district court denied their motion to continue the June 1988 trial date. Over 120 deposition notices were then served during the last two months before the May 1988 discovery cut-off.

Although they deposed alleged "key" defendants only at the last moment or not at all, petitioners sought many

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quite distressed by this and felt that we should hurry up and find ourselves a client . . . .

(R38.1213 Ex. F. at 17.)

[3] In this connection, the contention of *Amicus* Churches that the La Penca bombing "was the result of shipments of explosives from the United States into Costa Rica" (Churches Brief 11) is contrary to the evidence in the case and the ruling of the district court, which found that plaintiffs made "no showing" that the kind of explosives defendants were allegedly transporting could be "directly, or indirectly, traced to the explosive used at La Penca." *Avirgan v. Hull*, 691 F. Supp. 1357, 1374 (S.D. Fla. 1989).

[4] For example, at the initiation of the lawsuit and at numerous times throughout the litigation, the petitioners publicy alleged that defendants had combined with Colombian drug kingpins (such as Pablo Escobar and Jorge Ochoa) to form the alleged criminal enterprise responsible for the La Penca bombing. (*See, e.g.*, R4.141.38-39; R4.150.32.) However, at deposition, plaintiffs admitted no knowledge of any connection between these drug kingpins and the other defendants. (R45.1202.293-94.) Indeed, plaintiffs' filings in opposition to defendants' motions for summary judgment indicated that plaintiffs had no proof of a connection with the drug lords. (R17.635; R32.1082; R33.1099; R33.1102; R34.1113; R34.1130; R36.1157; R37.1176; R39.1268.)

high-publicity depositions in their last-minute discovery. Petitioners deposed or noticed the depositions of Oliver North, Fawn Hall, the Offices of the President and Vice-President, a dozen federal agencies, and Vice-President George Bush's son and security advisor. The depositions were publicized in the monthly Christic Newsletter and telephone "hotline." Readers of the Christic Newsletter were urged to write their congressman to call attention to the "numerous criminal acts" being uncovered by the Christic Institute. *See, e.g.*, Christic letter, *infra* note 5. The depositions were scheduled to coincide with the beginning of the presidential campaign, and readers were asked to "bring up" the Christic lawsuit as part of the electoral process. (R37.1178 Ex. E.)

While discovery lagged, the fund-raising and publicity efforts of the Christic Institute were in full swing. Pleadings in the case were sold by the Institute to raise money. For example, the Sheehan Affidavit (with photos) was available for $10.00. The complaint could be purchased for only $5.00. Plaintiffs' La Penca report was $8.00. Buttons, decals, and bumper stickers were $1.00 each ($.50 for orders over 100). (R37.1179 Ex. E.) Frequent mailers emphasized the Christic Institute's world-wide investigation.[5]

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[5] The following letter dated April 24, 1987 from the Christic Institute is an example.

> Dear Friend:
>
> Would you like to subpoena, question under oath, and prosecute the Secret Team working with Oliver North? With the help of supporters like yourself, we at The Christic Institute can do just that.
>
> * * * *
>
> We are the only private investigation with federal subpoena power, and our investigation has tracked the Secret Team's racketeering activities through Cuba, Southeast Asia, Libya, Chile, and Central America.
>
> * * * *
>
> The Christic Institute will put over 100 people under oath to develop the record of truth during the coming months. We

As the foregoing shows, petitioners, fueled by their extensive fund raising, used the scarce judicial resources of the federal courts not to obtain compensation for plaintiffs, as *Amicus* Churches contends, but rather to conduct their own Iran/Contra investigation. The need to stretch from support for the Contras to responsibility for the La Penca bombing caused petitioners to engage in sanctionable conduct as a necessary foundation for that private inquiry.

## ARGUMENT

### I. THIS CASE RAISES NONE OF THE POLICY ISSUES ADDRESSED BY THE *AMICI*

Contrary to the contentions of the proposed *amici*, this case does not involve the ability of plaintiffs to pursue justice, the chilling of public interest law, or the independence of the judiciary. Petitioners—plaintiffs Avirgan and Honey, their counsel, Daniel Sheehan, and his "law firm," the Christic Institute—were sanctioned not because they could not eventually prove their case nor because their suit was embarrassing to high-ranking government officials. Rather, they were sanctioned for filing and pursuing a case through two years of costly and irrelevant discovery on the basis of a frivolous complaint and the false Sheehan Affidavit. *Avirgan v. Hull*, 125 F.R.D. 189, 190 (S.D. Fla. 1989) (J. App. I, 51-A). *Amici* do not, and cannot, contend that lawyers and litigants may, with impunity, make misrepresentations to

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have doubled our staff to handle the litigation, public education, and organizing task before us. To bring the truth about La Penca and the Secret Team to the American people is a very expensive undertaking. Your generous contribution will help make this effort possible.

Drugs and assassination programs never serve the cause of democracy. Let's put a stop to them. Together we can win justice for the La Penca victims, expose the criminality of federal officials and stop the Secret Team. Thank you for your concern and participation.

(R10.405 Ex. A.)

federal courts or file and pursue frivolous suits based on such misrepresentations. Accordingly, the sanctions imposed on petitioners for such misconduct will not retard the pursuit of justice.

Moreover, neither one's status as a public interest law firm nor the nature of one's clients confers immunity from sanctions for bringing or maintaining frivolous suits and certainly not for filing false affidavits. The Second Circuit has rejected "out of hand" the claim that "special treatment of sanctions should be given to attorneys who handle unpopular civil rights claims, particularly those representing indigents and minorities." *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). As the court in *Oliveri* held:

> All attorneys are to be held to the same standards of conduct, no matter who their clients are. . . . Underlying the various rules imposing sanctions for attorney misconduct is a premise that all attorneys are expected to conduct themselves and their lawsuits according to the standards necessary for the proper, efficient functioning of our legal system.

*Id.* at 1280-81; *see also Roadway Express v. Piper*, 447 U.S. 752, 762 (1980) ("Dilatory practices of civil rights plaintiffs are as objectionable as those of defendants.")

## II. THE EXTENT OF PETITIONERS' INVESTIGATION DOES NOT EXCUSE THEIR FAILURE TO HAVE A REASONABLE BASIS TO FILE SUIT

The contention of *Amicus* Trial Lawyers for Public Justice ("Trial Lawyers") that petitioners conducted an "extensive" and "extraordinary" prefiling investigation (Trial Lawyers Brief 1, 2) is irrelevant to whether they violated Rule 11's requirement that every signed paper be "well grounded in fact." Quality not quantity is required. It is not the length of an investigation, but the result, that matters.[6]

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[6] Equally irrelevant are the indictments, convictions and reversals cited by Churches and the repeated references in its brief to

Rule 11 requires the signer to engage in a two-step process before asserting factual positions. First, the signer must conduct a reasonable prefiling investigation of the facts. *Donaldson v. Clark*, 819 F.2d 1551, 1555 (11th Cir. 1987). Second, upon reviewing the results of that investigation, the signer must reasonably believe that the position is "well grounded in fact . . . and not interposed for any improper purpose." Fed. R. Civ. P. 11. The reasonableness of the belief is judged under an objective standard. Thus, the complaints and all subsequent papers signed by Mr. Sheehan should have been well grounded in fact, regardless of the prefiling investigation.

Petitioners' two-year prefiling investigation, allegedly involving interviews of hundreds of witnesses, and petitioners' failure to unearth any competent evidence linking defendants to the La Penca bombing, should have led them to conclude that the allegations against respondents were not reasonable. Given Mr. Sheehan's allegedly extensive trial experience in complex litigation (R4.141), the groundlessness of the complaints should have been even clearer to him. Likewise, petitioners could not have reasonably believed that the Sheehan Affidavit—with its unknown, nonexistent, and dead "sources," its fabricated testimony, and the deceptive style that masked its shortcomings—was well grounded in fact.

The most telling evidence of the lack of a reasonable basis for filing suit and of the falsity of the Sheehan

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wrong-doing in "high places." Petitioners were not sanctioned in this case because of lack of a reasonable basis to believe that arms shipments were made to Central America or that government officials may have lied to Congress. Oliver North, John Poindexter, Robert McFarlane, Jose Fernandez, and other government officials named by Churches were not even parties to this suit. Conversely, having a reasonable basis to believe that arms shipments were made to the Contras or that false testimony was given to Congress does not justify naming 29 defendants as responsible for the La Penca bombing.

Affidavit was the sworn affidavit of Carl Jenkins. In his affidavit, Mr. Jenkins recounted his conversation with Mr. Sheehan during which Mr. Jenkins objected to certain information attributed to him in the Sheehan Affidavit:

> At the time Mr. Sheehan said to me that he was not concerned with the actual state of my knowledge an [sic] that he was using the affidavit simply to keep the case in court so that he could take discovery to prove the story. He further told me that he would drop sources such as me once he had developed hard sources. He also told me that the list of defendants whom he had sued was likely too large and that his intent was to use discovery to trim the list to those whom he thought were the real criminals.

(R16.595 Ex. D-1.)

## III. THE DISTRICT COURT APPLIED THE APPROPRIATE RULE 11 STANDARD

*Amicus* Churches contends that the district court "held that a plaintiff must possess admissible evidence sufficient to prove their [sic] case *prior* to the filing of a complaint and discovery." (Churches Brief 4.) To the contrary, the district court found the allegations in the complaint were "based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." 705 F. Supp. at 1545 (J. App. I, 33-A). Such "evidence" does not constitute a sufficient factual basis under Rule 11.[7] *See, e.g.*, Judge Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985); *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 207 (E.D. Ky. 1987); *Kendrick v. Zanides*, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985); *Miller v. Schweickart*, 413 F. Supp. 1059, 1061 (S.D.N.Y. 1976).

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[7] Nor does the result of John Hull's criminal libel trial, as *Amicus* Trial Lawyers (Trial Lawyers Brief 1-2) suggests. As respondents have already explained in their joint consolidated brief in opposition to the petitions, the Costa Rican court held only that Avirgan and Honey lacked the necessary intent to injure required to sustain the criminal charges. (R3.103.)

Furthermore, the district court did not sanction the petitioners solely because they could not survive summary judgment on the issue of causation, as *Amicus* Trial Lawyers contends. (Trial Lawyers Brief 4.) Rather, petitioners were sanctioned because they filed this case on the basis of rumor and innuendo and then maintained it by filing a false affidavit. Such frivolousness and deception were not involved in the *Matsushita* decision cited by Trial Lawyers.

Likewise, petitioners were not entitled to special consideration because of the circumstances of their prefiling investigation. The La Penca investigation was conducted by two journalists on the scene in Costa Rica. Information on La Penca was in Central America, not in the United States. Petitioners themselves have characterized the investigation as "massive" and *Amicus* Trial Lawyers calls it "extraordinary." Neither time [8] nor geography was responsible for the failure of petitioners' investigation to produce a reasonable basis to tie these defendants to La Penca.

Finally, *Amicus* Trial Lawyers also suggests that petitioners' failures of proof are the sort of "things that happen in litigation throughout the federal courts every day." (Trial Lawyers Brief 3.) To the contrary, lawyers do not submit false affidavits; they do not fabricate witnesses and testimony; they do not seek protection for dead, nonexesistent, or unlocatable witnesses; they do not sue all possible defendants until they can determine whom to drop; they do not pay their main witness; [9] and they do not pay their clients.

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[8] The suggestion that petitioners' prefiling investigation was rushed because of a presumed two-year limitations period in bringing RICO claims is raised for the first time by *Amicus* Churches (Churches Brief 13), and a two-year limitations period was not argued by respondents in the court of appeals.

[9] In his deposition, petitioners' chief witness, Mr. Wheaton, admitted receiving at least $15,000-$20,000 *in cash* from the Christic Institute for "reimbursement" for his expenses, although he kept no records of expenses or payments. (R18.656, Ex. C at 621-24.)

## CONCLUSION

For the foregoing reasons, the motions to file *amicus* briefs in support of petitioners should be denied. Furthermore, the *amicus* briefs provide no justification for granting the petitions of Mr. Sheehan, the Christic Institute, and plaintiffs Avirgan and Honey for writs of certiorari.

Respectfully submitted,

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No. 91-619

In The
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October Term, 1991

TONY AVIRGAN and MARTHA HONEY,

*Petitioners*,

v.

JOHN HULL, *et al.*,

*Respondents*.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

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Although there are three separate petitions before this Court -- this one filed by plaintiffs, another filed by Daniel Sheehan, and another filed by his law firm, the Christic Institute -- respondents, like the lower courts, often fail to differentiate among them in both their brief in opposition to certiorari ("Opp.") and their opposition to the motions for leave to file *amicus* briefs in support of certiorari. Because most of the opposition is directed at Sheehan and Christic, this reply will be quite brief.

The principal problem with the effort of respondents to defend the sanctions imposed against plaintiffs is that most of what they offer was not adopted by the lower courts. As we explained in our petition at 5-8, the primary basis on which plaintiffs were sanctioned is that they "must have known" when the complaint was filed that there was no "competent" (*i.e.*, admissible) evidence to support their claim. They had a great deal of what non-lawyers would understand to be "competent evidence," but, as the district court's grant of summary judgment makes clear, that was neither enough, nor what the court thought

was necessary when it imposed sanctions. It was their failure to have admissible evidence when they filed which led to the sanctions imposed by the district court for their "bad faith," and which the court of appeals relied on when it affirmed because "appellants [including clients and lawyers] knew (must have known) prior to filing this lawsuit that they had no competent evidence . . .." Pet. App. 21a.

In an apparent recognition that clients who are not attorneys can not be held liable under the bad faith exception for what is, in essence, a failure to recognize the difference between admissible and inadmissible evidence, respondents seek to justify the sanctions award under several alternative theories.* First, they attempt to make much of the fact that Christic paid plaintiffs while the lawsuit was pending (Opp. 23, 25), but fail to inform the Court that much of it was for reimbursement of travel and other out-of-pocket expenses, and the rest was compensation for services rendered in continuing the investigation and speaking on Christic's behalf. More importantly, the district court never mentioned these payments in the portion of its original fee opinion explaining the basis for its ruling (Pet. App. 24a-26a), but simply included one sentence in its "Clarifying Order" noting the payment, but not attempting to explain its relevance to the $1 million award (*id.* 44a). Moreover, the court of appeals never mentioned it at all (*id.* 18a-23a). Under those circumstances, it cannot be the basis to sustain this sanctions award.

Next, respondents argue (Opp. 24) that the complaint went far beyond the incident at La Penca, for which plaintiffs conducted an extensive investigation. Issues of relevance and of responsibility for the expansion of the complaint aside, neither lower court even mentioned the point, let alone relied on it as a basis for imposing a sanction. And, as to their "continued participation" as a basis for the sanction (*id.*), that did not included any direct participation in the litigation or the signing of any papers

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* Respondents do repeat the "failure to produce witness" charge made by the district court (Opp. 23), but that is simply a paraphrase of the district court's "no competent evidence" ruling, which cannot properly be applied to lay clients.

filed in court. Thus, like the prior efforts at saving the decision below, these too cannot serve that function because the sanctioning court did not rely on them for its finding of bad faith.

But even if the plaintiffs had done everything of which they stand accused by respondents, and the lower courts had relied on all of it, their conduct would not constitute bad faith as any other court has defined it. The contrast is most stark when the activities giving rise to sanctions here are compared with those that formed the basis of the fee award in *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), a case which respondents note (unlike the court of appeals), but whose significance they miss. Of course, *Chambers* stands for the proposition that clients can be sanctioned for bad faith litigation; the question is, what conduct is necessary before a finding of bad faith can properly be made? It is that aspect of *Chambers* that is so radically different from this case. Thus, it is the ease with which both lower courts here reached the conclusion that virtually any mistake in litigation, even one made by the client's lawyer, can be ascribed to the client and become the basis for a $1 million bad faith sanctions award, that is the principal reason why this Court should grant review.

Respectfully submitted,

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